LIBRARY
SUPREME COURT, U. S.

FILED
APR 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1416

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACYNTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Petitioners,

—against—

ELLIOT R. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their official capacity; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NORMAN REDLICH
Corporation Counsel for the City of New York
PAULA OMANSKY,
of Counsel
Municipal Building
New York, New York 10007
Tel.: (212) 566-2193
Attorney for the City of New York and Jule Sugarman

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Plaintiffs

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 5

Reasons for Certiorari 15

Conclusion 42

Appendix A

Opinion and order of the District Court for the Southern District of New York (Bauman, J.), denying plaintiff's motion for a preliminary injunction, dated October 16, 1972 ..... 1a

Appendix B

Opinion of the United States Court of Appeals for the Second Circuit (Friendly, Ch. J., Hays, Waterman, C.JJ.), modifying the order of the District Court and, as modified, affirming the denial of the preliminary injunction, dated January 18, 1973 ..... 19a

Table of Authorities

PAGE

Cases:

Boras v. *Village of Belle Terre*, —— F.2d —— (No. 72-2040, 2d Cir. March 16, 1973), denial of rehearing *en banc*, Timbers, C.J. dissenting, April 5, 1973 20

CWRO v. *Richardson*, 348 F. Supp. 491 (N.D. Calif. 1972) 24
Carleson v. *Remillard*, 406 U.S. 598 (1972) 25
Citizens to Preserve Overton Park v. *Volpe*, 432 F.2d 1307 (6th Cir. 1970) 30, 38
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 3, 16, 29, 30, 32, 34

Dandridge v. *Williams*, 397 U.S. 471 (1970) 20
Dublino v. *New York State Department of Social Services*, 348 F. Supp. 290 (W.D.N.Y., 1972), sub judice, O.T. 1972, No. 72-792 ..... 13, 36, 37

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 19, 21

Gordon v. *Lance*, 403 U.S. 1 (1971) 17
Gray v. *Sanders*, 372 U.S. 368 (1963) 17
Griffin v. *School Board*, 377 U.S. 218 (1964) 17

Hall v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd* 368 U.S. 515 (1962) 17

King v. *Smith*, 392 U.S. 309 (1968) 11, 25, 40

New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932) 20

PAGE

Onondaga County Department of Social Services v. *Dublino*, sub judice, O.T. 1972, No. 72-802 36

Packard v. *Banton*, 264 U.S. 140 (1924) 18

Railway Express Agency v. *New York*, 336 U.S. 106 (1949) 21
Rosado v. *Wyman*, 397 U.S. 397 (1970) 25
Rosado v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y. 1970) 6

Salsburg v. *Maryland*, 346 U.S. 545 (1954) 17, 26
San Antonio Independent School District v. *Rodriguez*, 41 L.W. 4407 (1973) 17

Townsend v. *Swank*, 404 U.S. 282 (1971) 25

Weber v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) 23
Williams v. *Rhodes*, 393 U.S. 23 (1968) 23
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 18

Federal Statutes and Regulations:

United States Code
5 U.S.C. §§701 et seq. 14
5 U.S.C. §706 14
28 U.S.C. §1254(1) 2
28 U.S.C. §1331 14
28 U.S.C. §1343 14
42 U.S.C. §601 18
42 U.S.C. §§601-610 5
42 U.S.C. §602(a)(8) 10
42 U.S.C. §602(a)(19) 8, 35

PAGE

42 U.S.C. §606(b) 27
42 U.S.C. §609 27
42 U.S.C. §§630 et seq. 8, 35
42 U.S.C. §632 18
42 U.S.C. §1315 24
42 U.S.C. §1983 14

The Administrative Procedure Act §706 ..... 3, 4, 30

The Social Security Act
§402 36
§402(a)(8) 10
§402(a)(19) 35, 36, 37, 41
§406 39
§406(b) 27
§409 ..... 27, 28, 35, 39
§1115 ..... *passim*

Public Law 87-543, 87th Cong., 2d Sess. (1962)
§101(b)(1)(E) 27
§105 27

Public Law 90-248, 90th Cong., 1st Sess. (1968), §204(c)(2) 27

Public Law 92-512 13

HEW Handbook of Public Assistance Administration, Pt. IV §8432.1 20
HEW Handbook for WIN, 1972, §90.1 *Counseling* 9
WIN/Public Service Employment Guidelines, Department of Labor, Manpower Administration, 1972 ¶10.a 8

PAGE

Other Materials:

Brief *Amici Curiae* of NWRO *et al.*, *New York State Department of Social Services* v. *Dublino*, O.T. 1972, No. 72-792 28
H.R. 4120, 74th Cong., 1st Sess. (1935) 39
Senate Report No. 628, 74th Cong., 1st Sess. (1935) 40
Conference Report No. 1605, 92d Cong., 2d Sess. (1972) 27
White House Press Conf. Caspar Weinberger, March 1, 1973 .....6, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

LYDIA AGUAYO, *et al.*,

—and—

CITY OF NEW YORK, *et al.*,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, *et al.*,

Petitioners,

—v.—

ELLIOT R. RICHARDSON, *et al.*,

—and—

ABE LAVINE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This case involves the operation of two experimental projects which are designed to deprive some 88,000 families in New York State of benefits and rights to which they are otherwise entitled under state and federal welfare law. Petitioners respectfully request the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on January 18, 1973, which affirmed the district court's denial of a preliminary injunction against implementation of these projects.

Opinions Below

The opinion and order of the district court, dated October 16, 1972, denying the motion for a preliminary injunction, is not reported, but is set forth in Appendix A to this petition.

The opinion of the Court of Appeals, dated January 18, 1973, modifying and affirming as modified the district court's decision, is not reported, but is set forth in Appendix B to this petition.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does the imposition by administrative officials of substantial burdens on and conditions for the receipt of statutorily prescribed public assistance benefits, only on families living in certain geographic areas of the state, selected *solely* for purposes of experimentation designed to determine the effect of such requirements on welfare recipients' behavior and public attitudes, violate the Equal Protection Clause of the Fourteenth Amendment?

2. Does §1115 of the Social Security Act authorize the Secretary of Health, Education and Welfare to permit a state to operate an experimental project in the public assistance program which deprives eligible individuals of rights and entitlements established under the federal and state statutes governing such public assistance program,

particularly where the scheme to be "tested" is a radical departure from the fundamental Congressional approach to such program and where identical experiments were previously tested in 12 states pursuant to specific Congressional authorization which was *repealed* after Congressional analysis of the results of those experiments?

3. Was the court below justified in applying as it did a less stringent standard for Secretarial action under §1115 of the Social Security Act, and for judicial review of that action, than was established by this Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1972), solely because the administrative determination in question related to welfare experimentation, and did the Secretary of HEW's approval of the two experimental projects constitute a lawful exercise of his authority under §1115 when measured by the standards prescribed in §706 of the Administrative Procedure Act as interpreted by this Court in *Overton*?

Statutes Involved

Section 1115 of the Social Security Act, 42 U.S.C. §1315, provides as follows:

> "In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title I, X, XIV, XVI, or XIX, or part A of title IV, in a State or States—
>
> (a) the Secretary may waive compliance with any of the requirements of section 2, 402, 1002, 1402, 1602, or 1902 as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project, and

(b) costs of such project which would not otherwise be included as expenditures under section 3, 403, 1003, 1403, 1603, or 1903 as the case may be, and which are not included as part of the costs or projects under section 1110, shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under the State plan or plans approved under such title, or for administration of such State plan or plans, as may be appropriate.

In addition, not to exceed $4,000,000 of the aggregate amount appropriated for payments to States under such titles for any fiscal year beginning after June 30, 1967, shall be available, under such terms and conditions as the Secretary may establish, for payments to States to cover so much of the cost of such projects as is not covered by payments under such titles and is not included as part of the cost of projects for purposes of section 1110."

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706, provides in pertinent part as follows:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;

(D) without observance of procedure required by law; . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Statement of the Case

This case challenges the right of state and federal agencies to compel destitute families to submit to being used as guinea pigs in an experiment which relates to the very means of their subsistence. The 88,000 families involved are all recipients of public assistance under the federally-funded Aid to Families with Dependent Children Program (AFDC), Title IV-A of the Social Security Act, 42 U.S.C. §601-610, in New York State, and it is this very dependence upon the state for the basic necessities of life which provides the opportunity for the exercise of compulsion. Thus, the U.S. Department of Health, Education and Welfare (HEW) and the New York State Department of Social Services (the state agency) are imposing numerous and burdensome conditions on the receipt of public assistance by such families which both agencies admit may not lawfully be imposed under Title IV of the Social Security Act (hereinafter Act), 42 U.S.C. 601, *et seq.* These conditions are being imposed in the name of experimentation under the aegis of two projects, Public Service Work Opportunities (PSWOP) and Incentives for Independence (IFI) submitted by the state agency and approved by HEW on the purported authority of §1115 of the Act. Families in the

selected project areas are compelled to participate in the projects. If they fail to satisfy the additional project conditions their assistance grant is drastically reduced even though they meet all the conditions of eligibility which may lawfully be applied in the regular statewide AFDC program and which govern the eligibility of all families in the state living outside the project districts.[1]

Obviously the imminent risk to these hundreds of thousands of citizens alone demonstrates the need for a careful and searching inquiry into the basis for and manner of HEW's action. Moreover, a similar project has been approved in California, and the Secretary of Health, Education and Welfare has recently announced that he intends to make even wider use of his authority to approve projects in order to give states greater "flexibility" in the administration of the AFDC programs, i.e., freedom to operate programs on terms and conditions other than those established in Title IV of the Act. White House Press Conference of Caspar Weinberger, March 1, 1973, pp. 4-5.

The PSWOP project, which covers the full 88,000 families (over 25% of the state's AFDC caseload), will operate in the Counties of Albany, Cattaraugus, Chemung, Franklin, Greene, Nassau, New York, Niagara, Oneida, Orange, Richmond, Rockland, St. Lawrence and the Bay Ridge Center in Brooklyn (Kings County). 60,000 of these 88,000 families live in New York City. Under this project, mothers of

[1] The current standard of need used for determining eligibility for AFDC is based on the *1968* prices of those items which the state has determined to be necessary to maintain a bare subsistence level of living. See *Rosado* v. *Wyman*, 322 F. Supp. 1173 (E.D.N.Y., 1970). The grant paid equals only 90% of the standard of need, or 75% of actual need based on 1972 prices. The reduction for failure to fulfill the project conditions would reduce a family's grant well below this 75% level.

children who are 6 or older and those children who are 16 or older and not in school will be required to accept assignments to public agencies to "work off" their family's AFDC grant.[2] If a parent fails to meet this condition by either failing to satisfactorily fulfill a work relief assignment or otherwise failing to fulfill any of the preliminary steps such as reporting for placement, seeking out day care, etc., the family's grant is reduced by subtracting the amount attributable to her needs, e.g., a family of 4 would receive ¾ of a 4 person grant.

These are *not* "regular" jobs nor do they pay a "regular" wage. Although a mother is working the number of hours purportedly required for her to "earn" her family's low grant, she does not receive this amount as a salary for her labor.[3] The family merely continues to receive its assistance grant under all the conditions and requirements which otherwise attach to receipt of public assistance, e.g., the requirement that the parent report to the state employment office twice a month to pick up the assistance check, the requirement that the family admit agency workers to its home. No "extra" money can be earned by working extra hours; the "worker" receives none of the usual "fringe" benefits (e.g., social security or other retirement coverage, paid sick leave, vacation pay), since she is not considered an employee of the agency for which she works.

---

[2] This is also known as "work relief" or "work for relief".

[3] An individual is assigned to work those number of hours which multiplied by the hourly rate assigned to such job for purposes of the project equals the assistance grant being paid to the family. For example, a mother with three children working off the average monthly payment for a family of 4, $310, at the hourly rate of $1.85 (the rate assigned to most "jobs" under the project) has to work 21 8-hour days a month, i.e., the full month.

The effect of the deprivation of rights accomplished by the projects goes far beyond the direct loss of benefits for those who fail to comply. Thus the loss of personal dignity felt by the petitioners at being compelled to accept work under conditions in which they are set apart in both fact and theory from their co-workers and marked as "second-class" workers whose labor is not worth the recognition or remuneration awarded to those accepted to work as regular employees, can never be compensated for after-the-fact. (See Affidavit of plaintiff Cadogan, Doc. 7.) They cannot even expect that their participation, as personally degrading as they may find it, might at least offer the chance of future financial improvement for their family, since the projects do not provide for any real job training, and do not even provide for their being hired into regular civil service jobs at the end of their participation under the project.[4]

Even more importantly to the mothers involved, the project threatens serious harm to their families. For example, they are being forced to place any child 6 or older in the care of any other person considered "adequate" by the welfare agency even where their parental judgment may be that such care will not be in the best interests of their children either because of the nature of the care

---

[4] In contrast, the Public Service Employment program under the federally mandated Work Incentive Program for AFDC recipients, (WIN) (42 U.S.C. §602(a)(19), 630 *et seq.*) requires not only that the individual be paid a regular salary during her period of PSC employment but also that the employing agency must make "a firm commitment to hire participants as regular, full time, permanent staff within the 6-12 month period of [placement as] employment [under PSE]". WIN/Public Service Employment Guidelines, Department of Labor, Manpower Administration, ¶10.a, page 11 (1972).

offered or because of their conviction that their children's needs cannot be adequately met by any substitute care arrangement. Since quality day care, provided by personnel trained in child development programs, is wholly inadequate to meet the demands of these projects, day care under the projects will generally mean a "babysitter" who may, indeed, be considerably less qualified to care for the parent's child than the parent herself.

This is but one of the severe strains placed on the maintenance of petitioners' family lives by the many adjustments needed to accommodate themselves and their children to their working outside the home, while still continuing to carry all the burdens of parental guidance and responsibility in a family already strained by the absence of one parent and the constant burden of poverty. Ironically, the emotional needs of the children in such situations are often intensified and complicated by the very fact of the mother's absence from the home. The significance of this problem and the need for "strong personal supportive counselling" to "help [families] to cope with problems that exist in the family or arise because the mother is out of the home so much during her training or work" has been specifically recognized in WIN, the federal work and training program. HEW, Handbook for WIN, 1972, §90.1 *Counseling.* No provision is made for any such counseling in these projects.

Admittedly many mothers do choose to work and to accept all the risks and burdens to family life attendant thereto. As noted in Commissioner Sugarman's affidavit (Doc. 2) no doubt many mothers make this choice in the hope that any problems entailed will be offset by the benefits to their family of their increased income. Of course, no such benefit accrues to the families herein. Moreover, the very fact that

petitioners' total income continues to be at a bare subsistence level (unlike the employed mother who receives an income disregard) exacerbates all of the problems which they must meet and resolve in order to allow them to function as both mother and unpaid breadwinner.

PSWOP and its attendant burdens does not constitute the whole of the scheme to deny the benefits of the federal AFDC program to recipients in New York State. A second project, Incentives for Independence (IFI) which is being run in three of the fourteen areas covered by PSWOP, i.e., Rockland and Franklin Counties, and the Bay Ridge Center in Brooklyn, imposes even more additional burdens and sanctions inconsistent with the requirements of Title IV-A on some 8,000 of these families. (Approximately 6,000 of these 8,000 families live in New York City, so that the major impact of both projects is in the City.) These families will suffer an even larger monetary penalty than a pro-rata reduction of the family grant if a family member fails to fulfill the work relief conditions. In addition there is a diminution of the "work incentive" income disregard mandated by §402(a)(8), 42 U.S.C. §602(a)(8), for those lucky enough to find private employment.

Moreover, *children* 15 and older who are *full-time students* and therefore exempt from the work relief requirement are required to accept assignment to a "community service project" in a "youth motivation" program. Although the state lauds the desirability of these assignments as useful character builders and opportunities to earn extra money, i.e., $1.60 an hour, the teenagers are compelled to participate on pain of a reduction in the family's grant rather than being offered an opportunity to volunteer therefor. (Two "useful" projects identified thus far in

Rockland County are school cafeteria clean-up and basketball polishing for the school team.) Both parent and child are thus faced with a draconian choice. Should the teenager submit to an enforced servitude, albeit a paid servitude, or should he or she claim the same rights of choice reserved to "non-needy" students and by so doing cause a loss of bread on the family table?

Furthermore, under IFI, those *parents* whose children demonstrate a truancy "problem" will be forced to *participate in group counseling* run by the *welfare agency* and to accept a plan for dealing with the child's "problem" formulated by such agency. Parents of non-poor children with identical "problems" are, of course, not subject to such mandatory counseling requirements and their children's school problems will be dealt with only through the educational system. Parents dependent on AFDC to meet their family's financial needs are thus required to accept direct governmental control over the performance of their parental functions as the price of receiving AFDC although the federal statute does not contemplate any use of the assistance grant as a means to control parental behavior or performance in non-financial matters. Cf. *King* v. *Smith*, 392 U.S. 309 (1968) at 320-330. These parents are not only deprived of their statutory right to receive financial assistance free of any such condition but are also thereby isolated from the rest of the community in terms of their parental rights and responsibilities and subjected to the indignity of being classified as less adequate parents than the parents of other students similarly "truant" whose families do not receive public assistance.

As noted above neither federal nor state legislature has determined that these particular AFDC recipients should

be subjected to these specific extra conditions. The scope and form of the projects is the combined product of two administrative agencies. Nonetheless, by approving these activities as projects under §1115 HEW is authorizing the state to require AFDC recipients to fulfill conditions which cannot be imposed on them under the federal statutes in order to continue to receive the full assistance benefits to which they are already entitled under such statutes. This effects a denial of federal statutory entitlements to all recipients in the project areas. Thus, under both PSWOP and IFI even those recipients who do not suffer a grant reduction because they fulfill the numerous additional burdensome conditions imposed, are denied the benefit of receiving their assistance subject only to those terms and conditions imposed by the Congress of the United States.

HEW issued its purported approval of these projects on June 1, 1972 notwithstanding its concomitant admission that it did not yet have all the information as to the proposed method of operation under the projects which it considered to be necessary to determine their acceptability. (28a-30a).[5] After submitting some further materials which so far as appears from the record have not yet been reviewed or acted upon by HEW, the state agency, on or about July 1, instructed local districts to begin project operations by August 1.

On July 27, 1972, the state agency having determined that the projects would not be operative in New York City by August 1, instituted fiscal sanctions against the City notwithstanding the fact that its inability to proceed was due, *inter alia*, to the lack of sufficient staff and resources

[5] References to the Court of Appeals opinion set forth in Appendix B are indicated by —a.

to perform the project tasks and to the consistent failure of the state agency to provide the City with a cohesive and rational statement of the project scheme and the operations required thereunder. See Affidavit of Jule Sugarman, August 1, 1972, Doc. 2. Recognizing that implementation of the projects under such circumstances would cause severe dislocation and disruption of the City Department of Social Services and would jeopardize its ability to perform its ongoing statutory obligations by requiring a diversion of already over-burdened personnel from their responsibilities, the City determined that it could not properly go forward. In addition, implementation of the projects imposes severe financial costs on the City which will incur at the very minimum an incremental annual cost of $8¼ million.[8]

Moreover, the City is effectively being pulled between two inconsistent demands since HEW has already informed New York, in an action unrelated to its consideration of these projects, that it has reason to question the ability of the City agency to carry out its duties under the federally-funded assistance programs and that it has identified the probable sources of these problems as inadequacies of staffing and training. HEW is requesting prompt correction. Clearly, the result of adding additional tasks which involve the administration of numerous and complex new procedures to this already greatly overburdened system

[8] The City's original estimate of incremental costs prepared on July 10, 1972 had indicated an incremental cost of $3 million. However, the fiscal harm to the City has been substantially increased by changes in circumstances since these projects were approved on June 1, 1972, including the changes in the state work program in AFDC required by the subsequent action of the district court in *Dublino* v. *New York State Department of Social Services*, 348 F. Supp. 290 (W.D.N.Y., 1972), sub judice, O.T. 1972, No. 72-792, and the ceiling on federal reimbursement for service expenditures imposed by P.L. 92-512 enacted on October 20, 1972.

is foreordained and the City cannot possibly both carry on the projects and improve its performance under the regular program. Just as clearly the resultant harms will flow not only to the City, but to the very individuals whom the Department is supposed to serve.

The instant suit was filed on August 2nd by individual recipients subject to the requirements of the projects, welfare rights organizations whose members are subject to the project requirements, and the City of New York and its welfare commissioner. Petitioners alleged that the federal respondents' approval of the projects was not in accordance with the requirements of §1115 of the Social Security Act, and that the projects as designed deprived them of their constitutional rights to due process and equal protection of the laws. Their claims were thus based on the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* (with respect to the federal respondents), and the Civil Rights Act, 42 U.S.C. §1983 (with respect to the state respondents), and jurisdiction was invoked under 28 U.S.C. §§1331, 1343 and 5 U.S.C. §701 *et seq.*

A temporary restraining order was entered by the Hon. Marvin Frankel of the Southern District of New York on August 4, 1972. That restraining order temporarily set aside HEW's approval of the two projects "to the extent that . . . no action adversely affecting any applicant for or recipient of AFDC may be taken in reliance upon such determination" and further prohibited respondent Lavine "from imposing on any AFDC recipients or the City of New York any sanction, fiscal or otherwise. . . ."

On October 16, 1972, the Hon. Arnold Bauman denied the motion for a preliminary injunction (Appendix A)

but stayed his order vacating the temporary restraining order pending application to the Court of Appeals. On October 24, 1972, the Court of Appeals (Hays, Moore, Mulligan, C.JJ.) denied petitioners' motion for a stay pending appeal, but granted a temporary stay until October 30, 1972 to permit an application to this Court. On October 30, 1972, the Hon. Thurgood Marshall extended that stay pending responsive papers and oral argument on the application and, on November 16, 1972, after considering the said responses (the federal respondents did not oppose the application), and oral argument, he extended the stay theretofore entered pending oral argument of the appeal in the Second Circuit. On December 1, 1972, following submission of the parties' briefs and oral argument, the Court of Appeals (Friendly, Ch. J., Hays, Waterman, C.JJ.) extended the stay pending determination of the appeal. On January 18, 1973, that panel modified, and as modified, affirmed the district court's denial of injunctive relief against implementation of the projects (Appendix B). The Court of Appeals continued the stay pending application by petitioners to this court for a further stay pending review on a petition for a writ of certiorari.

On February 7, 1973, Mr. Justice Marshall again granted an extension of the stay pending further order of this Court. On February 20, this Court denied petitioners' application for a stay.

REASONS FOR GRANTING CERTIORARI

There are three major reasons we believe warrant the issuance of a writ of certiorari in this case. First, the decision below has determined a novel question of constitutional law which should be settled by this Court because

of its broad implications with respect to the development of governmental programs discriminating between citizens on no basis and for no reason other than to select out subjects for experimentation. Second, the court below has decided a novel and important question as to the scope of the Social Security Act with respect to authorization of experimental projects which will have direct and substantial impact on the very subsistence of hundreds of thousands of citizens both in the immediate present and in the years to come. Finally, the decision below establishes a test for judicial review of administrative action in the area of governmental welfare programs which completely rejects the standards enunciated by this Court in *Citizens to Preserve Overton Park* v. *Volpe, supra,* and presages the limitation of that decision to situations involving similar if not identical governmental actions, viz., decisions affecting the physical environment, thereby leaving agency action in the broad realm of "social" programs effectively free of any judicial accountability. Moreover, HEW's action herein falls so far short of the standard for proper administrative action that judicial countenance of such approach can only serve to further embolden the agency in a continuing course of lawless actions, thereby directly injuring the hundreds of thousands of citizens who will be deprived of their rights by such actions and, just as importantly, drastically undermining the development and maintenance of a system of orderly governmental actions undertaken with due cognizance for the obligations as well as the powers of government. Thus the error wrought below calls for this Court's intervention not only to right the still avoidable wrongs which will ensue to the tens of thousands of families directly involved but also to prevent the other-

wise certain recurrence of such harms in the future, harms both to the individuals directly involved and to the very fabric of government.

1.

Equal Protection Claim

A question not heretofore addressed by the judiciary is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, rights and entitlements to public benefits established by a state legislature and by the Congress of the United States, may be taken away from 25% of the beneficiaries of such legislation, who are selected on the basis of their place of residence in the state, *solely* for the purposes of experimentation devised by administrative agencies. Petitioners do not challenge the rationality of the criteria used to determine who is "employable" and hence subject to the PSWOP and IFI work requirements *on that basis.* We challenge the validity of a classification which singles out *only* those recipients who are "employable" under such rules who happen to reside in one of the fourteen selected districts and imposes the PSWOP and IFI requirements on them.

To be sure, geographical discriminations are not *per se* invalid, see, e.g., *San Antonio Independent School District* v. *Rodriguez,* 41 L.W. 4407, 4415, n. 66, 4423, n. 110 (1973), but they are upheld by this Court *only* if a determination can be made that the classification based on place of residence is reasonably related to the purposes of the program within which it is made. See, e.g., *San Antonio Independent School District* v. *Rodriguez, supra; Gray* v. *Sanders,* 372 U.S. 368 (1963); *Gordon* v. *Lance,* 403 U.S.

1, 4 (1971); *Salsburg* v. *Maryland*, 346 U.S. 545, 552 (1954); *Packard* v. *Banton*, 264 U.S. 140, 143-44 (1924). Compare *Griffin* v. *School Board*, 377 U.S. 218, 231 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, 656 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962). Place of residence alone is, of course, totally unrelated to financial need, dependence of children, or lack of capability for self support, the relief of which is the stated purpose of the AFDC program, 42 U.S.C. §601, and allegedly, of the experimental projects at issue herein.

If New York had determined to apply a "work-for-relief" or "youth motivation" program in these 14 counties on the basis that in such counties unemployment of welfare recipients is greater, or public agencies are more able to absorb welfare recipients, or day care facilities are more readily available, or that the local welfare agencies are better able to handle the administrative responsibilities of a new program, perhaps the geographical classification would be rational. Cf. 42 U.S.C. §632. Such situations would merely represent examples of the generally accepted rule that a state "may take one step at a time addressing itself to the phase of the problem which seems most acute. . . .", a rule which has been applied in recognition of the fact that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

In the instant case, however, New York has *not* made any such judgment. Indeed, there has been no legislative judgment as to who should be covered by the project or even how such participants should be selected. The state agency proposes to run this experiment in the fourteen counties precisely because they are *typical* of the counties in the

rest of the state in terms of the problems of welfare dependency and the proposed solutions to those problems. "In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." *Eisenstadt* v. *Baird*, 405 U.S. 438, 454 (1972).

Clearly, therefore, the constitutional issue posed by such classification is at the very least novel. Yet despite this novelty and the obviously broad significance of any decision thereon, the court below engaged in what might best be described as a cursory analysis and disposition of the question as if this were such a well settled point of constitutional decision that any extensive discussion would only be redundant. Unfortunately, this approach itself compounds the effect of the court's error, since it engaged in such a broad sweeping endorsement of the constitutionality of the action at issue as to virtually legitimize any and all discrimination between citizens if done in the name of experimentation.

Faced with the lack of any basis for distinction as between the individuals living in the project areas and those living without, the Court of Appeals looked only to the question of general state purposes rather than the purposes of the particular program and found that the classifications based on residence did rationally serve "a" state purpose. The purpose is "to determine whether and how improvements can be made in the welfare system" (53a), and the classification furthered that purpose since it enabled a "controlled experiment." *Ibid.*[7] This proposition is a star-

[7] Lest there be any doubt that the Court of Appeals based its decision that the Equal Protection Clause was not violated on the conclusion that experimentation is *per se* valid, and that it did *not* determine that the decision by the respondent to impose PSWOP

tling one indeed. Under this rationale a state official could justify *any* burden which he imposed upon a geographic minority of the state's citizens merely by labelling the program or regulation "experimental," and, further, he would have the power to so mandate participation in experiments in any area of legitimate state interest.

Since all social and economic regulation is to some extent "experimental," however, in the sense that we are not sure of positive results, see *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), the Court of Appeals' rationale, if accepted, would place such broad discretion in the hands of government officials to determine which citizens will suffer the risks of such experimentation as to directly contradict the most basic principles of Equal Protection.[8] As re-

---

and IFI requirements *only* on recipients in selected areas of the state reasonably furthered a legitimate purpose of the AFDC program, the characterization of the decision below by another judge of the Circuit a few months later is instructive. In dissenting from a denial of rehearing *en banc*, Judge Timbers declared that "[w]e held [in *Aguayo*] that the New York work project program satisfied the new standard [of equal protection] because *experimentation* to determine whether improvements can be made in the welfare system *is a legitimate government objective*". *Boras* v. *Village of Belle Terre*, —— F. 2d —— (No. 72-2040, 2d Cir. March 16, 1973), denial of rehearing *en banc*, Timbers, C.J. dissenting, April 5, 1973, slip op. at 2699 (emphasis added).

[8] An "experimental project", assuming the requirements of federal regulations have been met, is one "which introduces a new method or approach in an effort to learn whether it is effective." HEW *Handbook of Public Assistance Administration*, Pt. IV, §8432.1. We believe it directly counter to the thrust of the Equal Protection Clause to subject a limited number of a state's citizens to substantial burdens, and deprive them of their otherwise due statutory entitlements, when the "benefits" to be gained or the harms to be suffered are by definition unknown. May New York establish a maximum grant limitation in only fourteen counties in order to test its utility as a work incentive? Cf. *Dandridge* v.

cently observed in *Eisenstadt* v. *Baird, supra,* 405 U.S. at 454, Mr. Justice Jackson's warning in 1949 is still applicable:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency* v. *New York,* 336 U.S. 106, 112-113 (1949).

The Court of Appeals without explanation or rationale exempts the behavioral experiments at issue here from this basic principle solely because they are experiments, and the citizens mandated to participate were allegedly selected by a "random, but rational basis" (53a). Petitioners contend that rather than lessening the state's burden of justification, the fact that these projects are designed as experiments, the state and federal governments being unwilling to burden all recipients with their requirements, imposes a greater burden on the state. Thus, while random selection may be a rational approach to assuring typicality of project participants, it is for this very reason that it runs

---

Williams, 397 U.S. 471 (1970) (statewide). Or could New York eliminate preferential tax treatment for investment income in only fourteen counties to test the hypothesis that taxation at ordinary rates will not impede investment incentive?

counter to the existence of a rationally-based differentiation in treatment.[9]

In sum, the Court of Appeals has determined that a different or lesser standard of equal protection is to be applied to welfare experimentation than to other areas of governmental action.[10] Aside from the absence of any authority for such a proposition, even if the court is correct that equal protection does not prohibit such "picking and choosing" amongst similarly situated individuals when the purpose of such selection is welfare experimentation, petitioners contend that equal protection at least demands that the state expose to the risks of the experimentation only that number of persons necessary to conduct a valid experiment. The record in this case demonstrates that the project scope was not so finely tuned, but rather reflected the state's desire to subject as many as possible to the requirements of the projects without regard to the needs of experimentation. The record shows, for example, that *25%* of the state will be subjected to PSWOP despite the fact that only "a *sample* of participating districts" will be evaluated by the consultants hired for this task. Similarly,

---

[9] Indeed, the record demonstrates that the selection of citizens was *neither* random *nor* rational. Thus, for example, the IFI application included the Hamilton Welfare Center in Harlem because it had separate personnel doing income maintenance and service functions, and because it was automated (computerized). The project was later modified to substitute the Bay Ridge Center in Brooklyn for the Hamilton Center, and the above criteria were dropped without explanation. (Bay Ridge is neither separated nor automated.)

[10] The court below relies heavily on the fact that this is a *welfare* experiment. "The Equal Protection Clause does not place the state in a vice where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action." (53a). See also *id.* at 41a ("the Secretary could properly take into account the growing antagonism to the welfare system").

with respect to IFI, while 8000 families are to be subject to that project, i.e., *2.5%* of the state, only 300 families will be evaluated. Indeed, the very difference between the numbers covered by PSWOP and IFI indicates the lack of relationship between the scope of the projects and the need for a sufficient sample to provide a valid basis for evaluation of the experiment. If 2.5% suffices for the testing of IFI, which contrary to the Court of Appeals' characterization is not merely an "embroidery" on PSWOP (54a, nt. 31), but a set of separate requirements and conditions which could stand or fall independently of the evaluation of PSWOP, there is no apparent reason why a similar sample size is not sufficient for PSWOP. Respondents have offered no explanation of this discrepancy and the Court of Appeals did not even admit that a legally cognizable discrepancy existed lest it be required to then resolve it.

It would seem that a balancing of the state's allegedly "legitimate" interest in seeking improvements in the welfare system by compulsory experimentation, and of the recipients' vital interest in the continuation of their statutorily prescribed assistance benefits, would compel that finer lines be drawn. Cf. *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 173 (1972). The court below merely presumed the rationality of the universe selected for the experiment, e.g., (54a, nt. 31), and ignored the undisputed evidence to the contrary.

2.

Interpretation of §1115

A second major issue is the proper interpretation and scope to be given to §1115 of the Social Security Act, 42 U.S.C. §1315. First, since 1962 when §1115 was added to the Act, it has undergone judicial construction only in the instant case and one other case. [*CWRO* v. *Richardson,* 348 F. Supp. 491 (N.D. Calif., 1972).] This case is the only one to reach appellate review. Second, §1115 is a statute with enormous implications. Drawn in broad terms, it purports to authorize an official of the Executive Branch to waive Congressionally-imposed restrictions on a multi-billion dollar grant-in-aid program. It is therefore of potential applicability in fifty-four separate jurisdictions, affecting millions of beneficiaries of five separate programs (Old Age Assistance, Aid to the Blind, Aid to the Permanently and Totally Disabled, Aid to Families with Dependent Children and Medical Assistance). Moreover, current implementation of the section differs markedly from its previous ten year history of administration, particularly in the authorization of experiments such as the instant ones which present fundamental departures from the basic Congressional welfare scheme in effect since 1935. And as noted above, the Secretary of HEW has made it clear that he not only intends to continue on his present course, but plans to increase and expand such section to further curtail any congressionally established "federal limits" on state action in the welfare programs. See *Press Conference,* Caspar Weinberger, *supra.*

The particular questions of statutory construction presented are as follows:

(a) *Denial of statutory entitlements*: Petitioners contend that §1115 does not authorize approval of experimental projects which substantially deprive welfare recipients of rights and entitlements guaranteed to them by other provisions of the Social Security Act by imposing conditions on their receipt of assistance which could not lawfully be imposed under such Act. It is our position that Congress would not have authorized such a fundamental departure from the basic principle that assistance must be provided to *all* eligible individuals under federal standards, e.g., *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *King* v. *Smith*, 392 U.S. 309 (1968), without either an express statutory indication of such intent, or an explicit recognition of this possibility in the legislative history.[11] See *Rosado* v. *Wyman*, 397 U.S. 397, 414, n. 17 (1970).

Quite to the contrary, petitioners have pointed to legislative history which indicates that the members of the Administration which asked for, drafted, and received, the §1115 authority described it *to the Congress* as limited to projects designed to improve "techniques of administration", and that the *Congress itself characterized* the effect of the provision in very limited terms with absolutely no

[11] It is to be noted that the Court of Appeals' treatment of this question suggests that there is a distinction between the imposition of additional conditions which, although they will substantially burden all, will only cause a monetary loss to those who do not meet them, and a mandated reduction of benefits for all. (43a nt. 24.) Obviously this is a distinction which is untenable in light of *Townsend*, *Carleson*, and *King*. In any case, that court's interpretation of §1115 permits an experiment which would have the effect of denying benefits to all recipients without regard to compliance with project "conditions." Indeed, the reduced income exemption for IFI participants is such an experiment, for such persons lose benefits even while complying with all project requirements.

indication that it perceived the section as a device to take away substantial rights that it had previously granted. See *Rosado, supra,* 397 U.S. at 414, n. 17. Moreover, the undisputed history of operation under §1115 for some 10 years from its original enactment to the present, during which over 400 projects were approved, none of which reduced beneficiaries' entitlements, supports petitioners' interpretation.

Furthermore, we submit that the Court of Appeals' rationalization that §1115 permits substantial diminutions of federally guaranteed rights because "the only limitation imposed on the Secretary [is] that he must judge the project to be 'likely to assist in promoting the objectives' of the designated parts of the . . . Act" (44a), begs the question. It is the very inconsistency between promotion of the objectives of the Act and the diminution of the statutory entitlements established by that Act which calls for our interpretation of §1115. It is our interpretation alone which gives meaning *both* to the authorization for waiver in §1115(a) and to the requirement that such waiver be granted only to enable the carrying out of a project likely to promote the objectives of §1115. The interpretation posited by the appellate court herein, which amounts to a finding that such section permits administrative abrogation of statutorily created rights without providing any clearly delineated legislative standards for the exercise of such "unfettered judgment" (48a), raises serious constitutional questions with respect to the scope of the legislative delegation and thus should be avoided.

(b) *Conflict with Specific Congressional Action*: Plaintiffs contend that §1115 does not authorize HEW in the guise of "experimentation" to authorize a state to carry

on a work for relief program when such programs have been previously tested and evaluated pursuant to a specific congressional authorization therefor, and have been specifically rejected by the Congress after consideration of their results. This period of testing was conducted under §409 of the Act, 42 U.S.C. §609, which was enacted in 1962 and continued in effect until 1968 when Congress abolished such authorization after receiving and considering the evaluations which it had required. P.L. 87-543, §§101(b)(1)(E), 105, 87th Cong., 2nd Sess. (1962); P.L. 90-248, §204(c)(2), 90th Cong., 1st Sess. (1968). Testing an activity which has been oft-tried, evaluated and rejected by the Congress is hardly experimental in anyone's sense of the word, much less an activity which offers any likelihood of promoting the congressional objectives.[12]

Indeed, authorization of such program is a fundamental departure from the basic congressional scheme for AFDC, tantamount to a rewriting of such program. From 1935 until 1962 when Congress authorized testing of work relief under §409, it consistently maintained that a system of work relief was alien to the approach it had adopted for the federal public assistance programs, i.e., the "money payment" or income maintenance approach, §406(b) of the Act, 42 U.S.C. §606(b). And it not only reaffirmed its original rejection thereof, first in 1968, and only recently again in 1972,[13] but also affirmatively determined that work and training programs for AFDC recipients should be con-

[12] As noted above, HEW's own definition of an "experimental project" requires novelty and original study. See nt. 8, p. 20.

[13] A proposal to reinstate §409 was made in connection with the recently passed "Social Security Amendments of 1972". It was rejected. See Conf. Rep. No. 92-1605 on H. R. 1, 92nd Cong. 2d Sess. (1972), at p. 29, rejecting Senate Amendment No. 567 which would have repealed the repeal of §409.

ducted in a manner to put them on a par with the rest of the population both during and after their participation in such program. Thus through WIN it provided for a program of bona fide training where needed and for opportunities to enter into regular wage-paying jobs with the full status of an employee (with supplementary assistance available if needed to fill any gap between earned income and the standard of need). See generally, Brief *Amici Curiae* of NWRO *et al., New York State Department of Social Services* v. *Dublino,* O.T. 1972, No. 72-792, pp. 16-39.

The Court of Appeals failed to perceive and accurately assess the scope of this departure because it arrived at a totally erroneous conception of the objectives of the AFDC program. For one, the court "found" that Congress had indicated basic acceptance of work for relief in the AFDC program from the outset by its enactment of §409 in *1935!* (42a) It then found further evidence of the consistency of the projects with congressional objectives in the "fact" that "WIN . . . is a *work relief program* virtually identical in scope and design to . . . PSWOP" (42a-43a).

In light of the true facts, however, there can be no question that the use of §1115 to permit states to require AFDC recipients to "work off" their assistance payments in the face of explicit congressional action to the contrary is the accomplishment by executive fiat of the substitution of another radically different program for the one intended by Congress. There is neither reason nor authority to suggest that Congress intended to confer such "legislative power" on the Secretary. Indeed, there is serious question as to whether such an authorization if intended would be constitutionally valid.

3.

The Standard of Review to Be Applied to "Informal" Agency Decisions

Petitioners contend that the materials before the Court of Appeals demonstrated that the Secretary did not make those judgments and determinations required for an exercise of his authority under §1115 before issuance of his approval of June 1, and that he otherwise failed to act in accordance with law, and that under the standards set down in *Citizens to Preserve Overton Park* v. *Volpe, supra,* his action must be set aside.[14] However, the Court of Appeals, determined not to hold the Secretary to the standard for administrative action set down in *Overton,* because it considered that greater latitude should be allowed an administrator when he is acting on a program that is only "avowedly experimental [with] . . . a fixed termination date" albeit an experiment affecting the "lives of thousands of people" rather than an "irreversible" step such as building a highway (40a-41a), especially when this program is in the "welfare" area (41a). The court therefore fashioned a different and less stringent test to be applied in the "welfare" area, a test under which the validity of administrative

[14] Although petitioners believe that the materials before the court, as scant as they are, constitute the full administrative record which was before the Secretary when he acted on June 1, the federal defendants advised the Court of Appeals at oral argument that it did not have the complete record. In any case, the only evidence of such administrative record before the court consisted of two HEW Action Memoranda submitted to the Secretary on May 31 and the attachments thereto. Contrary to the inference which might be drawn from the Court of Appeals' description of the record before it (40a) no affidavits nor any other testimonial statements were submitted by the federal defendants.

action is to be presumed from the fact of its exercise, absent a Secretarial admission to the contrary. (It is noteworthy that the approach followed by the court below is strikingly similar to that followed by the Court of Appeals for the Sixth Circuit in *Overton,* 432 F.2d 1307 (1970).)

Petitioners contend that the scope of inquiry required by §706 of the APA and by this Court's decision in *Overton* is the same for decisions in the welfare program as it is for those made in the highway program, and that a decision is no less arbitrary, unlawful, or in excess of statutory authority simply because its effects will last for a predetermined fixed period of time as opposed to an indeterminate period. (Indeed, semanticists might well argue as to whether an activity designed and calculated primarily to produce a direct effect on human beings is more or less "irreversible" than the destruction of parkland.) Furthermore, applying the *Overton* test to the record before the court, it is insufficient to support the Secretary's action. We submit that absent this Court's review of the Court of Appeals' decision, the salutary purpose which this Court sought to achieve by its review and decision in *Overton* is vitiated so far as administration of the welfare statutes of the United States is concerned, if not for all practical purposes in all programs.

The questions which will be raised include: (a) *Requirement of affirmative judgment.* We contend that under §1115 the Secretary is not authorized to approve implementation of an experimental project before affirmatively satisfying himself of its being "likely to assist in promoting the objectives of" the Act and that no such affirmative decision was made before issuance of the June 1, 1972 approval at

issue herein. The Court of Appeals admitted as much, finding that HEW's pre-approval memorandum of May 31, 1972 "detail[ed] certain *necessary information still lacking* from New York" (emphasis added), information which HEW had been requesting since at least November 24, 1971, and that the Secretary while purporting to approve the projects on June 1, required such further information to be submitted for review prior to project implementation (28a-30a). This additional information is material which goes to the very heart of the projects and their effect on individual families, and without which the Secretary could not reasonably have determined how and whether the projects would promote the Act's objectives.

The court's findings on this point alone should have sufficed for a holding that the June 1 approval was invalid since surely §1115 requires an affirmative, if informal, finding of acceptability, not a presumption of acceptability subject to a subsequent reevaluation. Authority to proceed under §1115 is a serious matter; duly enacted federal regulation is waived thereby. Congress did not intend that projects would be acceptable and implemented subject only to a subsequent review which may or may not be completed during the project's life. Rather, it specified that *only* those projects which meet the requisite standards may be approved.

However, the court made the necessary determination of project acceptability for the Secretary by rejecting his own determination as to the need for further materials before reaching a final decision. Thus it held that "the material furnished by the State in justifying the programs and applying for approval adequately covered the . . .

essentials, and [§1115] . . . does not require that, before the Secretary approves, every i must be dotted and every t crossed" (48a). See also at 47a, "the materials . . . sufficed." Surely there can be no clearer case of a court substituting its judgment for that of the Secretary albeit for the reverse of the usual reason for such error.[15]

(b) *Failure to consider all relevant factors.* Faced with a record which could not support a finding that the Secretary had in fact considered all relevant factors and indeed which affirmatively indicated that he had not, the court below simply chose to ignore the direction in *Overton* that it conduct a "searching and careful inquiry into the facts" to determine whether all relevant factors *had in fact been considered by the Secretary.* It determined instead that the proper test should be whether the Secretary *might* possibly have considered all the relevant factors assuming that he was aware of and considered all the matters hinted at by the materials in the administrative record. Thus the court substituted presumption for inquiry, upholding the Secretary's decision on a finding that "the materials before the Secretary *sufficed* for a consideration of the relevant factors by him" (47a) (emphasis added), not that he had in fact considered such factors.

---

[15] As noted in the court's decision, further materials were submitted by the state on June 14 and June 27. However, there is no question that the only administrative decision before the court, in the court's own view, was that made by the Secretary on June 1. Further, as noted by the Court of Appeals, there is no evidence of any subsequent decision ever having been made. See, e.g., 30a. Indeed, the Court of Appeals itself took care to provide, *sua sponte,* for the meeting of *all* work-related expenses, one of the June 1 requirements, after noting that the project procedures submitted to HEW after June 1 were deficient with respect to this item. See 24a, n. 4.

This use of presumption is doubly remarkable for not only is it an obvious departure from the proper standard of judicial review but it also flies in the face of the court's own findings, including those discussed in (a) above, as to an absence of information on, or consideration of, certain relevant points. For example, petitioners had also pointed to the absence of any Secretarial consideration of, much less decision on, the question of whether the state and local agencies had the ability to carry out the projects, including the ability to do so without interference with performance of any of the other duties of these agencies, and to the fact that a determination of such ability was clearly required by HEW's own regulations. Indeed, the evidence before the court indicated that if the Secretary had considered the matter he would have had to arrive at a negative conclusion, since it included a letter from HEW to New York indicating that prior to June 1 HEW had concluded there was a serious problem because of inadequacies in staffing and training with respect to the City's failure to promptly process regular applications and take proper case actions in a substantial number of cases in the regular programs (Doc. 15). This letter (dated August 16, 1972) stated this problem was still outstanding and requested that some steps be taken to improve the situation. Moreover, the Assistant Administrator, Research and Demonstrations, had admitted on July 21, that the question of the agencies' capability to perform effectively "was not an issue at the time of project approval" (Doc. 9, Ex. D).

To permit agencies to undertake the implementation of additional and complex special tests without considering their ability to continue to function under such workload is at least irresponsible; to do so in the face of evidence of

imminent breakdown is well-nigh malfeasance. Certainly there was no basis for upholding the Secretary's action unless he could offer some evidence to demonstrate that he had in fact inquired into this question, that this inquiry had taken into account HEW's own negative evidence on this point as well as any evidence adduced supporting a finding of capability, and that he had reached an affirmative decision on this point which was not arbitrary in the light of the evidence.

At first blush, the court's resolution of this matter appears to simply be a departure from *Overton* in line with its general substitution of presumption for inquiry—"HEW . . . demanded assurances of the State's capacity to perform [the projects], with which it was *presumably satisfied*[28]" (emphasis added) (49a). However, its next words not only contradict this statement but show that it actually freed HEW from the need to consider any relevant facts if they would be inconvenient—"[federal] defendants have not *unreasonably deviated* from their own rules" by failing to follow "a provision in HEW's Handbook . . . directing . . . 'apprais[al] [of] the *ability of the* [*applicant*] *agency* to provide for methods or organization, administration, and staffing which holds reasonable promise of *carrying out the project effectively*" (emphasis added) (49a, nt. 28).[16]

Similarly the record before the court lacked any evidence that the Secretary had been fully cognizant of the extent of the differences between these projects and WIN, the

[16] With respect to those factors which a welfare official does choose to consider, the court has freed him from the command of *Overton* that he look to the real world in making his statutorily prescribed determinations, allowing him instead to close his eyes to any facts or information other than that submitted to him by the supplicants for his approval (—a, nt. 27).

work and training program established by Congress. 42 U.S.C. §§602(a)(19), 630, *et seq.* Indeed, as discussed below, the record demonstrated that the Secretary had not granted a waiver of §402(a)(19) and this in itself gives positive evidence that he had not recognized the conflict between the projects and WIN. Certainly no reasonable judgment could be reached as to whether the projects would promote the objectives of the Act without understanding exactly how the approach to work and training therein differed from that adopted by the Congress.

For example, how could one assess the potential effects of the projects without considering the significance of the absence of almost all the important protections for recipients built into the federal work program, such as hearings at all stages prior to being subjected to the various work requirements, the 60 day counseling period prior to imposition of sanctions for non-cooperation, or the extensive policies and standards established by the Secretary of Labor for use in the WIN agency's determination of the employment potential of a particular individual and of the appropriateness of a particular work or training placement, or, indeed, the use of trained manpower staff for the employability and employment determination? Indeed without understanding the differences one could not even determine whether operation of these projects would interfere with the performance of the state and local agencies' mandated duties under WIN, surely a relevant consideration in determining whether such projects should be approved. Furthermore, the record was even devoid of any evidence that the Secretary had ever been aware of, much less considered the fact that Congress had specifically rejected work relief programs after providing for a test thereof from 1962-1967 under §409.

The court below, however, again refusing to look at the facts before it and refusing to hold the Secretary to any reasonable standard of action, held that it was sufficient that the federal respondents were "aware" that PSWOP and IFI differed "in some respects from WIN" (51a). Obviously application of such a standard precludes any meaningful review of the Secretary's action since there will always be some evidence from which one can infer that the administrative official had some "awareness" of what was involved in the matter before him for decision.

In short, the Court of Appeals has established a standard under which welfare decisions are immune from judicial review. It has told federal welfare officials that they do not have to act in an orderly and reasoned manner.

(c) *The Secretary's failure to act in accordance with the terms of §1115.* Under the terms of §1115, the Secretary may authorize action inconsistent with one of the requirements of §402 to the extent that he "waive[s] compliance with . . . [that] requirement." As noted above, the Secretary did not provide for waiver of §402(a)(19) in his approval of these projects. Petitioners contend that such provision bars the state from establishing any compulsory work program other than WIN, and therefore that the Secretary's purported approval of these projects without recognizing the conflict with §402(a)(19) and providing for waiver thereof is not in accordance with §1115.

Indeed, the instant case presents the same issue as that pending before this court in *New York State Department of Social Services* v. *Dublino, sub judice,* O.T. 1972, No. 72-792, and *Onondaga County Department of Social Services* v. *Dublino, sub judice,* O.T. 1972, No. 72-802. This reason

alone makes this case worthy of *certiorari* and justifies the granting of this petition. If this Court determines that §402(a)(19), which requires each state to provide for the registration of non-exempt AFDC recipients for the federal Work Incentive Program (WIN), and the certification to the Secretary of Labor[17] of those registered recipients who have been found after individual appraisal by the Secretary to be ready to be placed in regular jobs or training programs by him, bars state welfare departments from establishing any other compulsory state-run work programs for AFDC recipients, the decision of the Court of Appeals herein would have to be reversed, since *respondent Richardson did not waive §402(a)(19) with respect to either project in this case.* Having failed to waive §402(a)(19), that section operates with as much force and effect in the case of PSWOP and IFI as it did in the case of New York's statewide work rules enjoined in *Dublino,* and since PSWOP and IFI are inconsistent with the federal statute, they must give way to that statute under the Supremacy Clause.

The Court of Appeals accepted the fact of non-waiver and purported to accept petitioners' contention as to the effect of §402(a)(19). However, it nonetheless upheld the Secretary's approval as a proper exercise of his authority under §1115 holding that it would "elevate form over substance" to require the Secretary to act on such waiver since

[17] In New York State the Secretary of Labor has contracted with the State Employment Service of the New York State Department of Labor for the performance of his functions under the WIN program. Pursuant to that agreement, a special WIN division of the State Employment Service has been established to provide the various manpower services which the Secretary of Labor is required to provide under the WIN program. The regulations and procedures governing the WIN division of the State Employment Service are established by the Secretary of Labor.

"it [was] clear, both from the entire context and from specific references in the materials before him, that . . . the Secretary [was] well aware that the [projects] differed in some respects from WIN." (51a). (Compare the decision of the Sixth Circuit in *Overton*, 432 F.2d at 1313.) Of course, the court could not explain why the Secretary had not provided for the necessary waivers if he was so aware of the problem.

In any case, this conclusion totally vitiates the existence of any standard for Secretarial action under §1115. The Secretary is free to approve in generalities without specifically dealing with the question of what waivers are required and proper under §1115(a). The Congressional scheme for project approval requires specific identification of the inconsistencies between project proposals and the statute and particularized judgment as to whether and the extent to which a particular inconsistency should be permitted. This whole system falls if the Secretary need not specify the waivers which are or are not granted and if his approval of such inconsistencies is to be inferred merely from the fact of an undetailed "approval." Shall the courts at the behest of those subject to projects speculate endlessly as to whether a particular unmentioned conflict was nonetheless recognized or merely overlooked? Even more importantly, if the Secretary's action is to be validated by §1115 even though he has not followed the requirements for action prescribed therein, he is accountable to neither courts nor legislature, nor indeed is there any way in which Congress can grant limited powers.

Furthermore, the court's conclusion is not only erroneous as to the standard for Secretarial action, but proceeds from its erroneous judgment that the deviations were "de mini-

mis" and therefore did not require specific Secretarial attention. These errors in themselves if allowed to stand portend even more serious distortions of the Social Security Act in the future since they consist of erroneous interpretations of the fundamental purposes of the Act. Thus the court holds: (1) that the 1935 Act was intended to have single parents function as "breadwinners" wherever possible (including the somewhat incredible error of attributing enactment of §409 to the 1935 Act and positing some 30 years of operations thereunder) (42a), and (2) despite its contrary finding that the Secretary was aware of the inconsistencies between the projects and WIN, that "the WIN program is a *work-relief* program virtually identical in scope and design to New York's PSWOP" (42a).

In refutation of the Court's interpretation of the original program purposes one need only look to the actual words of those who drafted and enacted this legislation in 1935. The original Administration proposal for AFDC defined "dependent child" to mean

> "children under the age of sixteen in their own homes, in which there is no adult person, other than one needed to care for the child or children, who is able to work and provide the family with a reasonable subsistence compatible with decency and health." H.R. 4120, 74th Cong., 1st Sess. (1935), §203 of the proposed "Economic Security Act."

After modifications in the House which would have liberalized the test to include needy intact families (i.e., two parents in the home), the Senate returned to the original proposal by amending §406 to limit the definition of "dependent child" to one who "has been deprived of parental support or care by reason of the death, continued absence

from the home or physical or mental incapacity of a parent." The Senate specifically described the beneficiaries of its proposal as "the children in families which have been deprived of a father's support and in which there is no other adult than one who is needed for the care of the children." S. Rep. No. 628, 74 Cong., 1st Sess. (1935), p. 17.

Thus, as succinctly stated by this Court in *King* v. *Smith*, 392 U.S. at 328 (one of the very pages relied on by the Court of Appeals):

> "the Senate Committee Report [S. Rep. No. 628, 74th Cong., 1st Sess., 17 (1935)] stated: 'Many of the children included in relief families present no other problem than that of providing work for the breadwinner of the family.' Ibid. Implicit in this statement is the assumption that children would in fact be supported by the family 'breadwinner.'
>
> The AFDC program was designed to meet a need unmet by programs providing employment for breadwinners."

The court's second error necessarily demonstrates either a complete misunderstanding of the nature of the WIN program and the significance of its overall scheme or a failure to understand what the projects are all about. Thus the court failed to perceive the fundamental difference between a work-relief project such as PSWOP in which an individual "works off" a grant, and the job placement under WIN in which the individual must be placed in an employment situation in which he or she receives wages and is otherwise treated the same as all other individuals performing comparable work for the employing agency. Moreover, it failed to recognize the significance of Congress' having reached a specific determination as to the type of work and

training program consistent with AFDC, and as to the procedures which were to be used and the agencies which were to supervise and operate such program, including one of the most fundamental features of WIN, placement of direct operating supervision in a *federal manpower* agency.

Clearly, the court's misconstruction of the program purposes blinded it to the importance of the procedures and safeguards carefully established in the WIN program to protect against a system of work-referrals which did not give paramount importance to the maintenance of family life, and it was this lack of regard for the WIN structure which led it to seek a way to refrain from having to require the Secretary to make specific decisions as to the inconsistencies between these programs. However, whatever one might think as to what the Secretary would now do if confronted with the need to make a determination as to whether to waive §402(a)(19) and if so the extent thereof, it is clear that (a) his failure to do so when approving the projects, (b) the lack of any explicit recognition or cataloging of the inconsistencies between the projects and §402(a)(19), and (c) his clear knowledge of the procedures required as demonstrated by the careful listing of the waivers granted and of their extent, belies any reasonable inference that he was fully aware of such inconsistencies and intended a total waiver of §402(a)(19). Moreover, this is not a conflict related to minor or peripheral aspects of the project—the desire to act inconsistently with WIN is what the projects are all about. The court simply refused to hold HEW to acting in accordance with law in the administration of the welfare programs.

* * * * *

In sum, on all of the above points, the court substituted its judgment for that of the Secretary in order to avoid

any inquiry into the question of whether when he approved on June 1, he had made the required judgment after having first considered all the relevant factors and having followed all the procedural requirements prescribed by the statute and his own regulations.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 18, 1973

Respectfully submitted,

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare
Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Petitioners

NORMAN REDLICH
Corporation Counsel for the City of New York
PAULA OMANSKY,
of Counsel
Municipal Building
New York, New York 10007
Tel.: (212) 566-2193
Attorney for the City of New York and Jule Sugarman

APPENDIX A

Opinion and Order of the District Court for the Southern District of New York (Bauman, J.) Denying Plaintiffs' Motion for a Preliminary Injunction, Dated October 16, 1972

BAUMAN, *D.J.*

This is an action challenging the approval by the Secretary of the Department of Health, Education and Welfare (HEW) of two project applications submitted by the New York State Department of Social Services. These two projects, the Public Service Work Opportunities Project (PSWOP) and Incentives for Independence (IFI) were finally approved as demonstration projects pursuant to Social Security Act § 1115 (42 U.S.C. § 1315) on June 1, 1972 for implementation starting August 1, 1972. A temporary restraining order, issued on August 4, 1972, prevented this and application has now been made for a preliminary injunction. Plaintiffs also petition for the convening of a three judge court pursuant to 28 U.S.C. §§ 2282 and 2284.

The PSWOP program has been approved for an initial period of one year and is to be in effect in 14 social service districts throughout the State. It requires every "employable" member of a family receiving welfare assistance under the Aid to Families with Dependent Children (AF DC) program to register with the New York State Employment Service for training and employment. Employability is determined by reference to specific guidelines which exempt certain types of welfare recipients; those already employed, receiving training, or unable to accept employment because of the need to care for dependents. If

employable under the guidelines, the recipient would be required to accept referral to a suitable manpower training program, or to employment in the public or private sector depending on his particular qualifications. If the recipient is unsuited for a training program or regular employment, he would be referred to a job specifically established by the PSWOP program. Failure to comply would result in loss of benefits.

The IFI program, also of one year's duration, is to operate only in three of the 14 areas. Like PSWOP, IFI requires welfare recipients to accept training or employment. PS WOP however, only permits recipients to "work off" their welfare grants. They can earn no more than their weekly welfare stipend. Under IFI, a recipient who receives a job could keep a portion of his earnings without a grant reduction and might thus be able to increase his monthly income. IFI differs from PSWOP in two other major aspects. It includes a "Work Motivation For Youth" program which provides jobs for children of AFDC families who are over 16 and attending school as well as counselling for families whose children are school truancy problems.

Both of these programs are specifically denoted to be experimental.

Plaintiffs fall into three categories: recipients of public assistance under AFDC, welfare rights organizations, and the City of New York and its Commissioner of Social Services. Their attack on the PSWOP and IFI programs is twofold. First, they allege that the programs are constitutionally defective because they deny plaintiffs' right to due process and equal protection secured by the Fifth and Fourteenth Amendments of the Constitution. Second, they allege that the programs fail to comply with various requirements of the Social Security Act (42 U.S.C. § 301 et seq.).

For the reasons stated below, I find the plaintiffs' Constitutional claims to be without substance, and that as a consequence, this Court lacks jurisdiction over the State defendants. Jurisdiction over the Federal defendants pursuant to the provisions of the Administrative Procedure Act is properly invoked.

I.

At the threshold, one encounters a serious question of standing with respect to two of the three categories of plaintiffs. Although plaintiffs do not address themselves to this question, and defendants do so only briefly, it is the view of the Court that the welfare organizations lack the requisite standing to sue and the City of New York has standing only with respect to the statutory claims.

The case of *Sierra Club* v. *Morton,* 405 U.S. 727 (1972), seems determinative as to the welfare organizations. In that case, the Sierra Club sought a declaratory judgment and an injunction restraining Federal officials from approving a skiing development in a national forest. The Supreme Court reiterated the test of standing first enunciated in *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970) and *Barlow* v. *Collins,* 397 U.S. 159 (1970), i.e., plaintiffs have standing to challenge the action of a Federal administrative agency where such action caused them "injury in fact" and where that alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statute allegedly violated (397 U.S. at 153). In *Morton,* the Court found no indication that the Sierra Club would be significantly affected by the proposed development and observed that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the

party seeking review must himself have suffered an injury." 405 U.S. at 738.

In *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346 (E.D.N.Y. 1968), Judge Weinstein ruled that two welfare organizations were without standing to contest certain amendments to New York's Social Services Law because there was no showing of any injury to the organizations as distinct from the possible diminution of welfare benefits to its membership.

That is the case here as well.

The City of New York and its Commissioner of Social Services lack the standing to raise constitutional claims. The identical question arose in *City of New York* v. *Richardson*, —— F. Supp. ——, 71 Civ. 802 (S.D.N.Y. 1972), a case in which New York City sought to enjoin enforcement of the welfare provisions of the Social Security Act. Judge McLean held that a city, which is a political subdivision of a State, could not challenge the validity of a State statute on Fourteenth Amendment grounds, relying on *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36 (1933), the leading case on this question. *Williams* states: "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (289 U.S. at 40). I concur with Judge McLean in finding continued vitality in the reasoning of *Williams* and find that it binds the City of New York and its Commissioner of Social Services here.

The City of New York does, however, have standing to challenge the Secretary's approval under the provisions of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. 5 U.S.C. § 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved

by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Whether this statute permits municipal corporations to challenge agency action was implicitly determined in *Scenic Hudson Preservation Conference* v. *Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), which held, inter alia, that certain New York towns had standing to obtain review of an FPC decision to build a hydroelectric project. The Court there noted that the towns were "aggrieved parties" because the project's transmission lines would cause a decrease in the proprietary value of publicly held land, reduce tax revenues collected from privately held land, and interfere with long range community planning. See also, *Road Review League, Town of Bedford* v. *Boyd,* 270 F.Supp. 650 (S.D.N.Y. 1967), holding that a town had standing to challenge an administrative determination regarding the placement of highways.

Counsel for the City complains that the programs will involve it in additional expense of about $2.6 million.[1] Seen in relation to a total budget of over $8.6 billion and approximately 1¼ million people on the relief rolls the argument is almost trifling.[2] One would think the City would enthusiastically endorse a "responsible experiment" calculated to enrich the lives of its citizens by taking them off relief and putting them to self respecting work. However, in view of the alleged administrative burden and possible financial loss which New York City claims it will incur, I conclude that it is a "person aggrieved" within the meaning of 5 U.S.C. § 702 and may raise statutory claims.

---

[1] See affidavit of Jule M. Sugarman, at pp. 3-4.

[2] See brief of amici curiae, at p. 12.

II.

Plaintiffs allege jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337; pursuant to 5 U.S.C. § 701 as to the Federal defendants, and pursuant to 28 U.S.C. § 1343(3) as to the State defendants. For the following reasons the Court holds that it is without jurisdiction over the State defendants, and is possessed of jurisdiction as to the Federal defendants pursuant to 5 U.S.C. § 701 only.

Before reaching this question however, it is necessary to consider plaintiffs' Constitutional arguments. All of these contentions are insubstantial and thus the ultimate thrust of the attack on the programs is reduced to construction of the appropriate statutes.

Plaintiffs make three Constitutional claims. The first is to be found in the fifth and sixth claims of their complaint which charge that the implementation of the PSWOP and IFI programs in 14 social services districts in the State affect only one quarter of the State's welfare recipients. This, they argue, constitutes invidious discrimination in violation of the Fifth and Fourteenth Amendments' guarantee of equal protection. The recent case of *Dandridge* v. *Williams,* 397 U.S. 471 (1970), is a direct answer. It involved a suit by AFDC recipients to enjoin application of a Maryland maximum grant regulation as inconsistent with the Social Security Act and the Equal Protection Clause. The Supreme Court disposed of the equal protection argument as follows: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" (397 U.S. at 485). See also, *Jefferson* v. *Hackney,* 406 U.S. 535 (1972).

It is beyond reasonable dispute that the classification here at issue has a rational basis. The programs which the plaintiffs allege to be discriminatory are experimental projects of limited duration. New York State, in cooperation with the Federal government, has undertaken them to gain experience bearing on whether they should ultimately be applied throughout the State. It is not a matter of a State capriciously requiring some welfare recipients to work and exempting others. The classifications created for the experiment are neither arbitrary nor intended to be permanent. The districts clearly were selected in order to provide an adequate sampling of welfare recipients of various ethnic backgrounds as well as those from urban, suburban and rural areas and, seen in this light, seem eminently reasonable.

Plaintiffs' second Constitutional argument is that standards and defined procedures to be followed in the operation of the project are so utterly lacking as to be violative of the Due Process Clause of the Fifth and Fourteenth Amendments. They argue that the only standards provided are "tried and true catch words like 'good cause', 'adequacy', and 'suitability'" and that the individual case worker is left with virtually unfettered discretion. However, the materials submitted by the Department of Social Services in support of the PSWOP and IFI proposals contain a detailed list of the factors that are intended to guide administrative decisions. The criteria of employability, set out in the margin,[3] are as precise as might reasonably

[3] A recipient will be found employable and thereby subject to IFI or PSWOP work requirements except by reason of:

1. full-time employment;
2. attendance at school, including a vocational or technical school, a college or a university, for a minor other than an emancipated minor;

be required and further specificity would, it seems to me, impose insuperable burdens upon draftsmen and administrators alike.

Plaintiffs' final Constitutional attack depends upon an assumption that the PSWOP and IFI programs fail to provide a pretermination hearing as mandated by *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). However, the Social Services

---

3. attendance full-time in grade or high school for an emancipated minor;
4. full-time, satisfactory participation in an approved program of vocational training or rehabilitation which shall include but not be limited to participation in the Work Incentive Program or a two-year college program with a specific vocational objective;
5. part-time employment to the extent permitted by medical verification, or to the extent permitted by inability to secure adequate care for children or other incapacitated members except on a part-time basis;
6. mental or physical illness or incapacity medically verified to be of such significant or substantial nature as to prevent such person from engaging in employment; age shall be a basis of unemployability only when it is verified that the individual is potentially hazardous to himself or others with whom he is associated; and persons with a history of drug addiciton shall be deemed employable only when determined medically to be free of drug use or to be participating in a methadone maintenance program or a rehabilitation program; or
7. the need of such person to provide full-time care for other members of such person's household who are verified to be wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the social services district to obtain services or the assistance of others to provide such care.

In addition the following two conclusions applicable to all AFDC recipients are added in the project districts:

8. mothers or relatives caring for children under age 6;
9. mothers or female caretakers of children if the father or other adult male relative in the home is registered.

Department of New York State pursuant to 18 N.Y.C.R.R. § 385.1 et seq. has committed itself[4] to providing a hearing as to any PSWOP or IFI decision that might affect a recipient's right to receive public assistance. This would seem to insure a hearing to anyone challenging a determination of employability or a particular job assignment. Under the programs a recipient would continue to receive his grant whether or not he reported to his job assignment until the outcome of the hearing is decided—a provision seemingly designed to comply with the *Goldberg* standard. See also, *Dublino* v. *New York State Department of Social Services,* —— F.Supp. ——, Civil 1971—306 (W.D.N.Y. 1972), in which a three-judge court recognized that New York's hearing provisions satisfied the *Goldberg* test.

Accordingly, plaintiffs' Constitutional arguments seem so insubstantial as to require that I deny their motion to convene a three-judge court pursuant to 28 U.S.C. §§ 2282 and 2284.

III.

Plaintiffs argue that the Court has jurisdiction over both State and Federal defendants pursuant to 28 U.S.C. §§ 1331[5] and 1337.[6] The invocation of § 1337 is clearly

[4] See State defendants memorandum of law, p. 29 et seq.

[5] § 1331 provides, in pertinent part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

[6] § 1337 provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

frivolous. The Social Security Act is not an act "regulating commerce or protecting trade and commerce against restraints and monopolies" as Chief Judge Friendly noted in *Almenares* v. *Wyman*, 453 F.2d 1075 at 1082 (2d Cir. 1971), cert. denied 405 U.S. 944 (1972). Nor does this Court possess jurisdiction under 28 U.S.C. § 1331, the statute which provides for general "arising under" jurisdiction. None of the plaintiffs alleges an individual financial loss of $10,000 and *Snyder* v. *Harris*, 394 U.S. 332 (1969), precludes the aggregation of claims.

Plaintiffs further contend that 28 U.S.C. § 1343[7] confers jurisdiction over the State defendants. Although this question has not yet been finally resolved by the Supreme Court, this Circuit has held in *Almenares* v. *Wyman, supra*, that a substantial Constitutional claim is essential for jurisdiction under § 1343(3) because the Social Security Act is not an "act providing for equal rights of all citizens." Statutory claims do not suffice. As indicated, I regard the Constitutional claims in the instant case as insubstantial

---

[7] 28 U.S.C. § 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1935 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

* * * * *

and I therefore hold that no jurisdiction attaches to the State defendants pursuant to § 1343.

IV.

Jurisdiction over the Federal defendants does exist under 5 U.S.C. § 701 et seq., providing for judicial review of the actions of Federal agencies. The narrow issue before this Court then is whether the Secretary's determination, under 42 U.S.C. § 1315, that the PSWOP and IFI programs were likely to promote the objectives of Title IV-A of the Social Security Act was erroneous. The scope of judicial review of the Secretary's action is defined in 5 U.S.C. § 706. In essence, the statute requires this Court to determine, whether the Secretary's action was "arbitrary, capricious, an abuse of discretion", "contrary to Constitutional right", or "in excess of statutory jurisdiction." The Supreme Court has recently set the standards lower courts must apply in making such determinations. "To make this finding, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971).

After a careful study of the PSWOP and IFI programs, I have concluded that the approval of the Secretary was not erroneous. 42 U.S.C. § 1315 clearly states the consideration that is to guide the Secretary's decision here. The pilot or demonstration project may be approved if in the Secretary's judgment it is likely to assist in promoting the objectives of Title IV-A of the Social Security Act. Among the objectives of the Act, and the AFDC program in par-

ticular, are the strengthening of family life and the attainment of "maximum self-support and personal independence consistent with the maintenance of continuing parental care." (42 U.S.C. § 601). The Secretary obviously had these precise objectives in mind when he approved the PSWOP and IFI programs. They require welfare recipients to work in the hope that they learn the necessary skills so that they may live fuller and more productive lives thereafter. It is not the function of this Court under such circumstances to weigh the conflicting policy considerations that were brought to bear in devising these programs; that was the task of the State and Federal officials who formulated them. The Court's sole function here is to monitor the approval of the Secretary and to determine whether his decision was consistent with the objectives of the AFDC provisions of the Social Security Act. That it obviously is.

I must, however, advert briefly to plaintiffs' principal statutory argument. They contend that § 1315 forbids the approval of projects which diminish any statutory rights or entitlements established under the Social Security Act. The PSWOP and IFI programs, they argue, effectively diminish such rights and entitlements by forcing upon welfare recipients increased expenses for additional food, clothing and the like while their welfare stipend remains the same. This argument might have some cogency were one to accept plaintiffs' interpretation of § 1315. However, it has no authority either in the language of the statute or in its legislative history.[8] That section merely provides that

[8] A recent decision of the U.S. District Court for the Northern District of California rejected precisely the same interpretation of § 1315 urged by plaintiffs. In *California Welfare Rights Organization* v. *Richardson*, —— F.Supp. —— (Civil No. C-72 341 ACW), the Court upheld the Secretary's approval of the "California copayment experiment", a program whereby those eligible would

an approved project must be "likely to assist in promoting the objectives of" various titles of the Social Security Act. Obviously, a program which limits or varies certain of the various statutory entitlements may nevertheless further the objectives of the Social Security Act. Among these objectives, as has already been noted, is the desirability of increasing the independence and self sufficiency of welfare recipients and to assist in their integration into the work force.

Defendants do not dispute plaintiffs' contention that the PSWOP and IFI programs may slightly increase the weekly expenditures of welfare recipients, although the State Commissioner of Social Services has represented that the cost of transportation, lunch and clothing will be absorbed by the State. They contend that the programs may ultimately lead to the removal of recipients from the welfare rolls and thus serve the objectives of the Social Security Act despite any short term detriment to recipients participating in the projects. It must be remembered here that this is an experimental program of limited duration; a thorough evaluation after the program has run its course should disclose whether it has resulted in an actual, substantial diminution of benefits to welfare recipients.

Plaintiffs finally contend that the PSWOP and IFI programs are inconsistent with 42 U.S.C. § 602(a)19,[9] the so-

---

"co-pay" for medical assistance which the State provided. The plaintiffs argued that § 1315 forbade any diminution of medical benefits, but the Court found nothing in the language of § 1315 to support such an argument.

[9] 42 U.S.C. § 602(a)19 provides:

> A state plan for aid and services to needy families with children must provide—
>
> (A) for the prompt referral to the Secretary of Labor or his representative for participation under a work incentive program established by part C of—

(footnote continued on next page)

called work incentive or WIN program. WIN, administered by the Department of Labor, is a comprehensive manpower services, training and employment program. PSWOP

(i) each appropriate child and relative who has attained age sixteen and is receiving aid to families with dependent children,

(ii) each appropriate individual (living in the same home as a relative and child receiving such aid) who has attained such age and whose needs are taken into account in making the determination under section 602(a)(7) of this title, and

(iii) any other person claiming aid under the plan (not included in clauses (i) and (ii)), who, after being informed of the work incentive programs established by part C, requests such referral unless the State agency determines that participation in any of such programs would be inimical to the welfare of such person or the family;

except that the State agency shall not so refer a child, relative, or individual under clauses (i) and (ii) if such child, relative, or individual is—

(iv) a person with illness, incapacity, or advanced age,

(v) so remote from any of the projects under the work incentive programs established by part C that he cannot effectively participate under any of such programs,

(vi) a child attending school full time, or

(vii) a person whose presence in the home on a substantially continuous basis is required because of the illness or incapacity of another member of the household;

(B) that aid under the plan will not be denied by reason of such referral or by reason of an individual's participation on a project under the program established by section 632(b)(2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 20 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632(b)(3)

and IFI must be invalid, so the plaintiffs argue, insofar as their requirements conflict with those of WIN. All cases

---

of this title shall be disregarded in determining the needs of an individual under section 602(a)(7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632(b)(2) or (3) of this title shall be taken into account;

(E) that, with respect to any individual referred pursuant to subparagraph (A) who is participating in a special work project under the program established by section 632(b)(3) of this title, (i) the State agency, after proper notification by the Secretary of Labor, will pay to such Secretary (at such times and in such manner as the Secretary of Health, Education, and Welfare prescribes) the money payments such State would otherwise make to or on behalf of such individual (including such money payments with respect to such individual's family), or 80 per centum of such individual's earnings under such program, whichever is lesser and (ii) the State agency will supplement any earnings received by such individual by payments to such individual (which payments shall be considered aid under the plan) to the extent that such payments when added to the individual's earnings from his participation in such special work project will be equal to the amount of the aid that would have been payable by the State agency with respect to such individual's family had he not participated in such special work project, plus 20 per centum of such individual's earnings from such special work project; and

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A)(i) and (ii) and section 607(b)(2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the

cited by plaintiffs in support of this proposition,[10] among them *Dublino* v. *New York State Department of Social Services,* —— F.Supp. —— (W.D.N.Y. 1972), held that *State* work programs inconsistent with WIN are invalid because they violate the Supremacy Clause. They are obviously inapposite, however, because PSWOP and IFI are not State but Federal programs approved by the Secretary of HEW and the Supremacy Clause is not applicable.

---

determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor;

* * * * *

[10] *Woolfolk* v. *Brown,* 325 F.Supp. 1162 (E.D.Va. 1971), aff'd 456 F.2d 652 (4th Cir. 1972); *Bueno* v. *Juras,* —— F.Supp. —— (D.Ore. 1972); *Jeffries* v. *Sugarman,* 345 F.Supp. 172 (S.D.N.Y. 1972).

The inconsistencies between PSWOP and IFI and § 602(a) 19 are of course covered by the provisions of 42 U.S.C. § 1315 already cited, which permit the Secretary to waive any of the requirements of § 602 in approving a demonstration project. Although plaintiffs argue that there has been no explicit waiver by the Secretary of § 602(a)19, a fair reading of the "Action Memorandum" approved by the Secretary for the PSWOP program (Federal defendants' Exhibit A) or for the IFI program (Exhibit B) compels the conclusion that § 602(a)19 is implicity waived by the Secretary's waiver of § 602(a)10. The memorandum shows an awareness of the possible inconsistency between the PSWOP program and § 602(a)19 and the acknowledgment of such inconsistency in itself constitutes a waiver.

For all of the reasons given above, plaintiffs' motion to convene a three-judge court is hereby denied, and their motion for a preliminary injunction against enforcement of the PSWOP and IFI programs in New York State is hereby denied.

The above constitute my findings of fact and conclusions of law in accordance with Rule 52(a) Fed. R. Civ. P.

So ordered.

Dated: October 16, 1972

/s/ Arnold Bauman
U.S.D.J.

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit (Friendly, Ch. J., Hays, Waterman, C.JJ.), Modifying the Order of the District Court and, as Modified, Affirming the Denial of the Preliminary Injunction, Dated January 18, 1973

(See Opposite) ☞

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 479, 508—September Term, 1972.

(Argued December 1, 1972 Decided January 18, 1973.)

Docket Nos. 72-2195
72-2243

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACINTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Appellants-Plaintiffs,

—against—

ELLIOT R. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their offi-

cial capacities; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Appellees-Defendants.

Before:

FRIENDLY, *Chief Judge,*
WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Arnold Bauman, *Judge,* denying a preliminary injunction against New York State's carrying out two experimental work projects, approved by the Secretary of Health, Education and Welfare, for employable members of families receiving assistance under the Aid to Families with Dependent Children program.

Modified and Affirmed.

ADELE M. BLONG, Esq. (Steven J. Cole, Esq., Henry A. Freedman, Esq., and NLSP Center on Social Welfare Policy and Law, Inc., New York, N.Y., of Counsel), *for Appellants Aguayo, et al., and Upstate Welfare Rights Organization, et al.*

PAULA OMANSKY, Esq. (Norman Redlich, Esq., Corporation Counsel, City of New York, of Counsel), *for Appellants City of New York and Jule Sugarman.*

JOSEPH P. MARRO, Esq., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, Jerome T. Levy, Esq., and Thomas Scarlett, Esq., Department of Health, Education and Welfare, of Counsel), *for the Federal Appellees.*

AMY JUVILER, Esq., Assistant Attorney General (Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Samuel A. Hirshowitz, Esq., First Assistant Attorney General, and Constance B. Margolin, Esq., Law Apprentice, New York, N.Y., of Counsel), *for Appellees Lavine and New York State Department of Social Services.*

—and—

(Robert J. Egan, Esq., Marion P. Ames, Esq., and Mildred A. Shanley, Esq., New York, N.Y., of Counsel), *for various civic and social organizations appearing as Amici Curiae in support of the contentions of Appellants-Plaintiffs.*

FRIENDLY, *Chief Judge:*

This appeal is from an order of Judge Bauman in the District Court for the Southern District of New York denying a preliminary injunction in an action by three sets of plaintiffs to enjoin the New York State Commissioner of Social Services and the State Department of Social Services (NYSDSS) from carrying out two experimental work project programs for employable members of families receiving assistance under the partially federally funded Aid to Families with Dependent Children

(AFDC) program and to set aside the approval of the programs by the Secretary of Health, Education and Welfare under the demonstration project provision of the Social Security Act, 42 U.S.C. § 1315. The three sets of plaintiffs are: six women who might be required to take employment under the projects, suing individually, on behalf of their minor children and of other persons similarly situated; the City of New York and Jule Sugarman, Commissioner of its Department of Social Services, both of whom will have roles in administering the projects; and seven welfare rights organizations. There are two sets of defendants. One, the federal defendants, comprises the Secretary of Health, Education and Welfare (HEW), the Administrator of its Social and Rehabilitation Service; its Regional Commissioner; and the Department itself. The other set, the state defendants, includes New York's Commissioner of Social Services and the Department of Social Services.[1]

I. *The Nature of the Two Projects*

The two projects, known as Public Service Work Opportunities Project (PSWOP) and Incentives for Independence (IFI), were formulated by the State Department of Social Services and approved by HEW for one year.[2]

---

1 In light of the naming of the individual defendants we have no occasion to consider the propriety of the unnecessary joinder of the Department of HEW and the New York State Department of Social Services.

2 Statutory authorization for IFI's development and its submission to HEW can be found in N.Y. Soc. Serv. Law § 29-a (McKinney Supp. 1972). The statutory basis for PSWOP is less clear. The state seems to rely on id. § 350-k-1, see PSWOP Policy and Procedures, at 1, even though that section provides for what seems to be a statewide program. But since the question of state authorization has not been raised, and because we cannot say that legislative approval of a statewide program does not include the power to establish demonstration projects, we will join the parties in assuming that PSWOP has been properly established by the State.

The State envisions PSWOP as providing public service work opportunities for those AFDC recipients who are able to work but for whom regular employment, training or public service employment has not been available or appropriate. Approximately 25% of the State's AFDC cases, comprising those recipients living in fourteen welfare districts in New York City, two counties in the metropolitan area surrounding the City, three upstate urban areas and six counties in the rest of the state, are to be included in PSWOP.

The local departments of social services in PSWOP districts must see to it that employable recipients[3] of AFDC benefits register with the appropriate office of the New York State Employment Service. Semi-monthly interviews are to be scheduled for the recipients with employment counselors so that an employment plan, for a private sector job, training, public service employment (in IFI districts only), or a PSWOP job, can be developed. If the state employment service is unable to find other employment or a training program within thirty days, assignment of the recipient to a PSWOP job becomes mandatory. PSWOP employ can involve work for any state, city, town or village agency or school district located in the county. Broadly speaking, the work will be of the sort which, because of budgetary problems or otherwise, would not be undertaken except for PSWOP; workers in the program are not to displace those who would otherwise be employed.

---

3 But for two additional exemptions, employability for purposes of PSWOP is defined by N.Y. Social Serv. Law § 131.4 (McKinney Supp. 1972), which closely parallels the standards set out in the federal work incentive (WIN) program. Compare 42 U.S.C. § 602(a)(19)(A). Also exempt from PSWOP are: (1) mothers or relatives caring for children under 6 years old; and (2) mothers or female caretakers of children if the father or other adult male relative in the home is registered. However, any exempt recipient may register on a voluntary basis.

No individual will be required to participate in PSWOP unless satisfactory child-care arrangements can be developed, and each case must be assessed to determine adequacy, although the state requires that "[d]iligent efforts . . . be made by [the recipient] and the social services district to obtain child care services or the assistance of others to provide such care." Public Service Work Opportunities Project (for ADC and ADC-U Recipients) Policy and Procedures, at 3 [hereinafter PSWOP Policy and Procedures].

PSWOP workers will not receive earnings over and above their welfare benefits. The number of hours to be worked will be determined by dividing the amount of the participant's grant by the hourly wage to be received, but in no case will an individual be required to work more than eight hours a day or forty hours a week. The hourly rate will be the state minimum wage or the wage paid to employees for comparable work in the unit of government in which the project is conducted, whichever is higher. Participants will be reimbursed for lunch and transportation costs, and all work-related expenses incident to participation are to be paid "so that no recipient will incur any actual net reduction in income due to such participation." HEW Action Memorandum (re PSWOP), May 31, 1972, at 5.[4] Participants will also be covered by workmen's compensation. See N.Y. Soc. Serv. Law § 350k-3(d).

---

4 The appellants argue that the State program will not in fact reimburse the participant for all work-related expenses. They contend, for example, that the State will not pay for additional cold-weather or personal grooming items required because of the need to go to work. Although the State's *PSWOP Policy and Procedures* at 8, does not clearly delineate the types of expenses for which reimbursement will be granted, the State must make provision for payment of "any expenses reasonably related to the earning of income," since HEW has not explicitly or impliedly waived § 402(a)(7) of the Social Security Act, 42 U.S.C. § 602(a)(7), for the PSWOP program. See HEW Handbook of Public Assistance Administration, pt. IV, § 3140.1 (1964); *cf. Connecticut State Dep't of Public Welfare* v. *HEW*, 448 F.2d 209, 216-17 (2 Cir. 1971).

Failure to accept a justifiable referral or to participate properly after such a referral "without good cause" is a ground for termination of assistance, 18 N.Y.C.R.R. § 385.6. Upon request a fair hearing must be granted prior to termination, but if the recipient has not accepted the referral or has not continued to participate in the program and then receives an adverse determination at the hearing, a thirty-day suspension of benefits is mandated even though the recipient agrees to immediate compliance. See 18 N.Y.C.R.R. § 385.7.

The Incentives for Independence (IFI) demonstration project has four components: (1) a combination of two public service employment programs—PSWOP and the Emergency Employment Act (EEA) Public Service Employment Program—for adults unable to find regular employment; (2) an earnings exemption; (3) work motivation for school youth through participation in community work projects; and (4) a counseling service for the parents or caretakers of truant children. The project covers approximately 2.5% of the state's AFDC and Home Relief[5] recipients and will be conducted in three areas—a welfare center in New York City (Bay Ridge), a suburban county (Rockland), and a rural county (Franklin)—all of which are contained in or are coextensive with areas in which PSWOP will function.

Appellants also contend that the State Dep't of Social Services, Administrative Letter 72 PWD-121, Aug. 10, 1972, limits the allowance for lunch expenses to $1.00 per day and the monthly allowance for transportation and lunches to $40.00 per month. But the letter seems to have been addressed only to changes in public work projects for employable Home Relief recipients and not to PSWOP or IFI. See 18 N.Y.C.R.R. § 385.10(a), (e)(5); n.5 *infra*.

5 Home Relief is a state program of public welfare for families not eligible for federally funded assistance. See N.Y. Soc. Serv. Law §§ 157-58 (McKinney Supp. 1972). There is no indication that the appellants are attacking that part of the IFI program which affects Home Relief recipients.

As with PSWOP, all nonworking employable recipients will be required to participate in counseling, to report for job interviews and to accept work or training if offered, and no recipient will be considered employable unless a satisfactory child-care plan is available. Individuals in IFI districts can be assigned to PSWOP jobs if employment or training programs in the regular economy are unavailable, and their work obligations and benefits will be identical to those of other individuals in PSWOP programs, except that the sanction for noncompliance in IFI districts is a flat $66 per month reduction in assistance until the individual complies. A limited number of recipients in IFI districts, however, will be assigned to "public service employment" jobs, subsidized by EEA funds, which will pay the higher of the minimum wage or the prevailing wage for persons in similar public occupations. Unlike PSWOP workers, employees in public service employment will work full-time and be paid full wages. Participants will receive workmen's compensation, health insurance, unemployment insurance, and all other fringe benefits conferred on employees of the same employer; their work conditions and promotional opportunities will also be the same as those of regular employees.

A certain portion of the wages paid in these public service employment jobs will be ignored when determining the recipient's eligibility for a supplementary welfare assistance grant. This "income disregard," which differs from that normally mandated by the federal government for AFDC recipients in regular employment, see § 402(a)(7), (8) of the Social Security Act, 42 U.S.C. § 602(a),(7), (8), by lowering the income level at which supplementary assistance payments terminate,[6] will be applied in IFI districts

---

6 Under the federal formula, the first $30 per month of income earned in regular employment of the balance are exempt. All expenses incident to employment are then also disregarded. Under the IFI formula, the

to all AFDC and Home Relief recipients in public service employment or in regular employment.[7]

Furthermore, the children of families receiving AFDC or Home Relief in IFI districts who are 15 years of age and attending school full-time (and are not otherwise ineligible)[8] are required to participate in "Work Motivation for Youth." This program will require the child to work for up to six hours semi-monthly during the school year and up to sixty hours during the summer vacation. Participants will be paid $1.60 per hour for no more than 150 hours per year. Refusal to comply will result in a $6.25 semi-monthly reduction in the family grant, unless the parent certifies that he or she is trying to get the child to cooperate. Also, when a child fails regularly to attend school, the parent or caretaker in a family receiving assistance must accept counseling services or face a reduction in the grant.

---

cost of day care is exempted as is the first $60 per month of expenses: one-third of the remainder up to 150% of the federal payments level is then exempted, and one-quarter is exempted thereafter. The IFI formula will generally yield smaller exemptions because under the federal formula (1) *all* expenses incident to employment are exempted, (2) the one-third exemption is uniformly applied to the balance, and (3) the exemption for expenses incidental to employment is taken *after* one-third of the gross income has been exempted. See *Connecticut State Dep't of Public Welfare* v. *HEW*, 448 F.2d 209, 214-15 (2 Cir. 1971).

7 Currently employed AFDC recipients in IFI districts will not be subject to the revised income disregard.

Under existing state law, there is a $30 per month income disregard for Home Relief recipients. N.Y. Soc. Serv. Law § 159-b (McKinney Supp. 1972). Home Relief recipients in IFI districts will benefit from an increased income disregard. See n.6 *supra*.

8 The child would not be eligible if, for example, he or she were required to participate in a supplementary or remedial educational program or were required at home for family care.

II. *The Processing of the Projects by the HEW, and the Proceedings in this Action.*

The New York legislature originally provided for a work relief program for AFDC recipients in April 1971. See N.Y. Soc. Serv. Law § 350-k (McKinney Supp. 1972). In a letter written soon after enactment to George K. Wyman, then Commissioner of the State Department of Social Services, HEW stated that the work program was inconsistent with several federal requirements and could not receive federal funds. In August 1971, following discussions with President Nixon on welfare reform, Governor Rockefeller announced that New York would seek approval from HEW under § 1115 of the Social Security Act, 42 U.S.C. § 1315,[9] for an experimental work relief project, thus permitting a temporary waiver of certain federal requirements. New York submitted formal applications for the PSWOP and IFI projects on September 9 and 10, 1971, which were then revised and resubmitted on November 11, 1971.

On November 24, 1971, HEW approved both projects, contingent, however, on submission by New York of further information before December 31, 1971. The conditions called for revised and more detailed budgets, further information on personnel administration, and, with respect to IFI, requests for further waivers and rather extensive additional information on proposed implementation, including "a plan for general project activities (screening, referral, monitoring, etc.)." New York forwarded on Decem-

---

9 In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of . . . part A of subchapter IV of this chapter [the AFDC program], in a State or States—

(a) the Secretary may waive compliance with any of the requirements of section . . . 602 . . . of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project . . . .

ber 28, 1971, letters not appearing in the record, which purported to meet HEW's conditions. On February 9 and 10, 1972, HEW responded, finding many of the budgetary specifications to be inadequate and requiring complete budgetary submissions as well as additional information on numerous operational aspects "prior to implementing the project." State officials, on February 22, 1972, provided HEW with two two-page letters responsive to some but—particularly as to IFI—not all of HEW's requests. The letters requested permission to begin implementation April 1, 1972.

Before any HEW responses, the District Court for the District of Columbia, enforcing an agreement between HEW and the National Welfare Rights Organization in settlement of an earlier suit brought under the Freedom of Information Act, on March 13, 1972, required HEW to withdraw its November 24, 1971, approval and to allow the Center on Social Welfare Policy and Law thirty days to examine the proposed projects and present an analysis to HEW.[10] On April 11, 1972, the Center sent HEW and NYSDSS an extensive letter prepared by Adele Blong, who has given the individual and organization plaintiffs superb representation, analyzing what it considered the defects of IFI and PSWOP and urging HEW not to authorize the programs. NYSDSS responded in two undated letters to HEW, one identifying the many objections raised by the Center and the other seeking to answer them.

Without having received further information from New York, the HEW staff prepared "Action Memoranda" which were presented to the Secretary on May 31, 1972, recommending approval of the projects but detailing certain necessary information still lacking from New York. On June

---

10 *National Welfare Rights Organization* v. *Richardson*, —— F. Supp. —— (Civ. 2178-71, D.C.C. March 13, 1972).

1, 1972, the Secretary approved the application for section 1115 demonstration projects, but again required further information prior to implementing each project. The further information requested included, *inter alia*, evidence of the availability of child care facilities, details of the fair hearing procedures to be used, and a statement that all work-related expenses would be reimbursed. On June 14 and 27, 1972, the State sent letters containing assurances of compliance and information concerning, respectively, PSWOP and IFI. Two weeks later, apparently without further official communication between HEW and NYSDSS, the state officials notified local welfare agencies to begin implementation of the projects on August 1, 1972.

The complaint herein was filed on August 2, 1972. Upon application by the plaintiffs, the district court, on August 4, issued an order temporarily suspending the HEW's approval of the projects to the extent that it permitted imposition of loss of benefits as a sanction and restraining the state defendants from imposing any sanction for nonparticipation; at the hearing Judge Bauman extended the stay pending resolution of the motion for a preliminary injunction.[11] On October 16 the court rendered an opinion. Judge Bauman held that the welfare organizations lacked standing and that the City of New York (and implicitly also Commissioner Sugarman) had standing to raise only what are hereafter referred to as the statutory claims. He found that all claims of constitutional violation were insubstantial, that federal jurisdiction nevertheless existed by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, but that the statutory claims had not been shown to be meritorious. Accordingly, he denied the motion for a temporary injunction. Another panel of this court denied

11 The state officials were permitted to continue the projects on a voluntary basis but elected not to do so on the ground that projects so restricted would not yield the desired information.

a further stay, except for several days to allow appellants to petition the Supreme Court. On November 16, 1972, after a hearing in chambers, Mr. Justice Marshall ordered that the stay be continued pending argument before this court, and directed that the appeal be heard on an expedited basis. We continued the stay pending decision. Unhappily the variety and difficulty of the questions raised have prevented our rendering this as soon as we should have wished.

III. *Standing.*

As is usual in welfare cases, before coming to the merits we must weave our way through a maze of problems relating to standing and jurisdiction. The complaint raised both constitutional and statutory claims, which we state at this point only insofar as necessary to an understanding of the preliminary issues. It alleged, as against the state defendants, that because the two projects were imposed on only a portion of those eligible for AFDC benefits, these defendants violated the equal protection clause of the Fourteenth Amendment, and that the New York statutes with respect to hearings for suitability for the projects and the failure to develop specific standards and procedures applicable to the participants violated the due process clause.[12] The most important statutory claims were that the projects were so basically inconsistent with the Social Security Act as to lie beyond the power of approval of demonstration projects vested in the Secretary of HEW by 42 U.S.C. § 1315; that the record before the Secretary was inadequate

12 The complaint alleges that the hearing provisions violate the due process clause of the Fifth, not the Fourteenth, Amendment. Although the approval process of HEW might bring the matter within the purview of the Fifth Amendment, we assume—since the briefs were clearly directed to this point—that reference to the Fourteenth Amendment was intended.

to warrant such approval under the standards laid down in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); and that the approval was inadequate because of its failure to waive compliance with the work incentive (WIN) provisions of the Social Security Act, 42 U.S.C. § 602(a)(19). We shall consider the standing of each set of plaintiffs to raise each type of claim.

At first blush it would seem almost too clear for argument that relief recipients within the general class at which a work program is aimed would have standing to challenge it on both constitutional and statutory grounds. Compare *Sierra Club* v. *Morton*, 405 U.S. 727, 732 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.*, U.S. (1972), 41 U.S.L.W. 4071.[13] The state defendants contest this on the basis that, except for Hyacinth Cadogan, none of the plaintiffs has been found to be employable and, on their own allegations, will not be found to be. We are not at all sure that this is an answer; the threat of compulsory enrollment would seem enough, except perhaps when there was no rational basis for fear. However, it is unnecessary to pursue the subject since, if Mrs. Cadogan has standing,[14] it is immaterial whether the other individual plaintiffs have this.

Relying on *Sierra Club* v. *Morton, supra*, 405 U.S. 727, the district court held that the seven welfare organizations lacked standing. Appellants contend that the judge read the decision too expansively. They point to passages in the

---

13 It should be clear that we are here discussing only the issue of *standing; jurisdiction* with respect to the statutory claims is another matter because of the $10,000 amount requirement of 28 U.S.C. § 1331.

14 We are unpersuaded by the state defendants' argument that Mrs. Cadogan has suffered no damage from participating in PSWOP by working mornings in the New York City Hall library sorting books for the few days before PSWOP was temporarily restrained. If she could not lawfully be compelled to do the work she is doing, that is damage enough.

Court's opinion emphasizing that "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes" by the development the Club sought to challenge, 405 U.S. at 735; pointing out that "[t]he Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public' ", *id.* at 736; and suggesting, *id.* at 735-36 n.8, that the Club might amend its complaint to show injury to members. The complaint here alleges that members of at least some of the organizations are potential subjects of the projects and that other members will suffer from a worsening of the overall welfare administration situation if the projects are implemented. We agree that this suffices to give these organizations standing under the general federal question statute, 28 U.S.C. § 1331, but see fn.13 *supra*, or, if it were applicable, 28 U.S.C. § 1361.

The question whether the welfare organizations have standing under the civil rights statute, 42 U.S.C. § 1983, and its jurisdictional implementation, 28 U.S.C. § 1343(3), is more difficult. Section 1983 confers a cause of action on "any citizen of the United States or other person within the jurisdiction thereof" who has been deprived under color of state law "of any rights, privileges, or immunities secured by the Constitution and laws." Neither this language nor the history recently reviewed in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), suggests that an organization may sue under the Civil Rights Act for the violation of rights of members. All of the justices who formed the majority in *Hague* v. *CIO*, 307 U.S. 496, 514, 527, 532 (1939), seem to have held the contrary, and this portion of *Hague* was not overruled by *Lynch*. We do not

regard the line of decisions beginning with *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958), and continuing through *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 n.9 (1960), and *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961), to *NAACP* v. *Button*, 371 U.S. 415, 428-29 (1963), as having altered that principle in any way helpful to the organization plaintiffs here. The statements in those opinions that the organization has standing to assert the rights of its members were made in the context of a claim of abridgment of the constitutional right of association; indeed, in all but the last case, the right to refrain from disclosure of membership because of the adverse effect of disclosure on both the association and the members was the very point at issue. See *NAACP* v. *Alabama ex rel. Patterson*, *supra*, 357 U.S. at 459-60. While the Court said in *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 739, "[i]t is clear that an organization whose members are injured may represent those members in a proceeding for judicial review," followed by a citation to *Button*, we think this must be limited to the issue there *sub judice*, standing to seek review of the action of federal officers, and not as broadening the standing of organizations as plaintiffs under the Civil Rights Act. See *National Welfare Rights Organization* v. *Wyman*, 304 F. Supp. 1346, 1348 (E.D.N.Y. 1969); *Crossen* v. *Breckenridge*, 446 F.2d 833, 839 (6 Cir. 1971).

The complaint asserted that implementation of the projects for a year would impose additional administrative costs on New York City, which Administrator Sugarman estimated to aggregate a net amount exceeding $2,500,000 per annum. Although the state defendants contend that this figure is excessive, they do not dispute that the City will be confronted with substantial added costs. The district court held that the City had standing to assert the statutory claims against the federal defendants, as is not

here disputed, but that, under *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933), it had no standing to assert constitutional claims. While this may be true with respect to New York City itself, we see no sufficient answer to the argument that *Board of Education* v. *Allen*, 392 U.S. 236, 241 n.5 (1968), requires a recognition of standing on the part of plaintiff Sugarman to assert constitutional claims. Like the school board members in that case, he is faced with what he deems a conflict between his oath to support the United States Constitution and his duty under state law to carry out the New York projects. While *Allen* was an appeal from the New York Court of Appeals, Mr. Justice White said, 392 U.S. at 241 n.5, that the conflict there visited upon school board members gave them a "personal stake in the outcome" of the litigation, citing *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). If they thus had standing to press a constitutional claim in the Supreme Court, although their pocketbooks were in no way affected, we fail to see why Sugarman does not have similar standing to assert constitutional claims in the district court, as the citation of *Baker* v. *Carr*, an action begun in a federal district court, with jurisdiction predicated on 28 U.S.C. § 1343(3), would imply. We also are by no means certain that the reasoning of *Williams*, that "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator," 289 U.S. at 40, applies to a claim by a city that federal action violates the Fifth Amendment. The state, not the federal government, has "created" the city. While a city is not a citizen entitled to privileges and immunities under section 2 of Article IV, or section 1 of the Fourteenth Amendment, we would not consider that the issue whether, for some purposes, such as a claim of dis-

criminatory treatment affecting its finances, it might not be a "person" entitled to protection under the Fifth Amendment was necessarily foreclosed by *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966), although it may be difficult to see how a city can be a "person" if its progenitor is not. On the other hand, a city would clearly lack standing to raise due process claims (*e.g.*, lack of fair hearing) relating to its citizens.

The upshot of all this is:

1) At least plaintiff Cadogan has standing to raise both constitutional and statutory claims.

2) At least some of the welfare organizations have standing to raise statutory claims.

3) The City has standing to raise statutory claims, and Sugarman has standing to raise both constitutional and statutory claims. The City lacks standing to assert constitutional claims against the State; we need not decide whether it is totally deprived of standing to raise constitutional claims against the federal defendants.

IV. *Jurisdiction*

Such difficulty as exists with respect to jurisdiction stems from the $10,000 jurisdictional amount requirement in the general federal question statute, 28 U.S.C. § 1331, and the ruling in *Snyder* v. *Harris* and the companion case of *Gas Service Co.* v. *Coburn*, 394 U.S. 332, 335 (1969) forbidding aggregation of the class action claims save in the two circumstances there stated.[15]

---

15 As in *Almenares* v. *Wyman*, *supra*, 453 F.2d at 1083 n.11, we again do not find it necessary to pass on the correctness of *Bass* v. *Rockefeller*, 331 F. Supp. 945 (S.D.N.Y.), *appeal dismissed as moot*, 464 F.2d 1300 (2 Cir. 1971) with respect to aggregation. *See Note, Federal Jurisdiction over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1428-32 (1972).

Some avenues of escape proposed by plaintiffs must be rejected. The Social Security Act is not an "Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States," 28 U.S.C. 1343(3), so as to remove the jurisdictional amount requirement for the statutory claims. *McCall* v. *Shapiro*, 416 F.2d 246, 249 (2 Cir. 1969): *Almenares* v. *Wyman*, 453 F.2d 1075, 1082 n.9 (2 Cir 71), *cert. denied*, 405 U.S. 944 (1972). Neither is ' Social Security Act an "Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies" within 28 U.S.C. § 1337. *Id.* Finally, despite the breadth with which we have read 28 U.S.C. § 1361, see *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371, 374-75 (2 Cir. 1968), *cert. denied*, 394 U.S. 929 (1969); *Cortright* v. *Resor*, 447 F.2d 245, 250-51 (2 Cir. 1971), *cert. denied*, 405 U.S. 965 (1972), we cannot properly characterize this as an "action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

We are also unwilling to follow the district court in avoiding the jurisdictional amount problem with respect to the statutory claims by reliance on § 10 of the Administrative Procedure Act, 5 U.S.C. § 702, as an independent grant of jurisdiction. The Supreme Court has not squarely faced this recurring problem. Professor Davis, Administrative Law Treatise, § 23.02 (Supp. 1970), cites *Rusk* v. *Cort*,[16] 369 U.S. 367 (1962) and *Flast* v. *Cohen*,

16 Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 329 n.76 (1967), point out that the only explicit discussion of jurisdiction—in Justice Brennan's concurring opinion, 369 U.S. at 380—"may have intended another nuance of the term 'jurisdiction,'" since his discussion applied equally to the APA and to the Declaratory Judgment Act—the latter of which clearly does not grant independent jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum*

392 U.S. 83 (1968), as having settled that § 10 of the APA constituted an affirmative grant, and it is indeed hard to see how else jurisdiction could have existed. However, neither opinion adverted to the issue, and it is impossible to believe that the Court would have disposed of so important a question *sub silentio*.[17] Also, the final paragraph of *Oesterreich* v. *Selective Service Board*, 393 U.S. 233, 239 (1968), looks to us like a reference to jurisdictional amount, although Professor Davis ingeniously argues against this, § 23.02 at 792-93. See also *Breen* v. *Selective Service Local Board*, 396 U.S. 460 (1970). Our own decisions are similarly inconclusive. While *Cappadora* v. *Celebrezze*, 356 F.2d 1, 5-6 (2 Cir. 1966), assumed that § 10 of the APA was a jurisdictional grant, *Wolff* v. *Selective Service Board*, 372 F.2d 817, 826 (2 Cir. 1967), indicated that jurisdictional amount must be met in an action against federal officers. In *Mills* v. *Richardson*, 464 F.2d 995, 1001 n.9 (2 Cir. 1972), we said that the question whether the APA was an independent jurisdictional grant had not been determined in this circuit. The problem is not an easy one, and decision will be rendered unnecessary if Congress should accept the sound recommendation of the Administrative Conference, 1 Recommendations and Reports of the Administrative Conference of the United States 169 (1970), that, whatever may be done generally with respect to jurisdictional amount in federal question cases, the time has

---

Co., 339 U.S. 667 (1950). Indeed, the majority opinion, 369 U.S. at 372, focuses its discussion on the policies behind the Declaratory Judgment Act. Professor Byse and Mr. Fiocca conclude, 81 Harv. L. Rev. at 330, that while "the question remains open," "the Supreme Court should hold that section 10 confers jurisdiction." See, for a conclusion similarly based on considerations of policy, Jaffe, Judicial Control of Administrative Action 165 (1965).

17 Professor Davis also cites *Leedom* v. *Kyne*, 358 U.S. 184 (1958), but that action clearly fell within 28 U.S.C. § 1337 even though the draftsman of the complaint had not cited it.

long since come to adopt the proposal, made by Professor Herbert Wechsler when the Judicial Code was last revised, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 211 (1948), that jurisdictional amount has no place in actions against federal officers.

Combining those claims in which we have found standing with this court's liberal application of the doctrine of pendent jurisdiction, *Astin-Honor, Inc.* v. *Grosset & Dunlap, Inc.*, 441 F.2d 627 (2 Cir. 1971); *Leather's Best, Inc.* v. *S.S. Moormaclynx*, 451 F.2d 800, 809 (2 Cir. 1971); and *Almenares* v. *Wyman, supra*, 453 F.2d at 1083-86, suffices to sustain jurisdiction over both types of claims against both sets of defendants. Under 28 U.S.C. § 1343(3) the district court had jurisdiction of Mrs. Cadogan's and Sugarman's constitutional claims[18] against both sets of defendants. Under 28 U.S.C. § 1331 it had jurisdiction over the City's statutory claim against both sets of defendants since the City's allegation that it had more than $10,000 at stake was clearly substantiated. The other claims have a "common nucleus of law and fact" with these. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Under these circumstances it would be absurd to fragmentize this litigation, especially when, as in *Almenares*, all the claims are federal in nature.

V. *The Statutory Claims*

As instructed by *Thorpe* v. *Housing Authority of the City of Durham*, 386 U.S. 670 (1967), *King* v. *Smith*, 392 U.S. 309 (1968), and other cases, we begin by considering the claims that, for a variety of reasons, the approval of the Secretary of HEW was ineffective to authorize the

18 As will later be shown, at least one of these, the due process claim with respect to hearings, was substantial.

departures from requirements of § 402 of the Social Security Act, 42 U.S.C. § 602, concerning state plans for aid and services to needy families with children which PSWOP and IFI concededly involve.

We note preliminarily that consideration of these claims, like those in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), takes us into a type of judicial review considerably more difficult to define and exercise than traditional review of administrative action. We have here no adversary hearing, no record, no statement of the grounds for the Secretary's action,[19] except as these may be inferred from the papers on which he acted and from the largely unhelpful documents prepared specifically for this litigation.[20] While we shall follow the guidelines helpfully stated in *Overton*, 401 U.S. at 416-17, so far as applicable, we find more merit than do the plaintiffs in the defendants' position that, purely legal issues apart, it is legitimate for an administrator to set a lower threshold for persuasion when he is asked to approve a program that is avowedly experimental and has a fixed termination date[21] than a proposal, like that in *Overton Park*, which is irreversible. Moreover, *Overton Park* dealt with a situation where an administrator was required to make two highly

---

19 The task of reviewing courts would be greatly facilitated by such statements, however brief and informal.

20 As noted in *Overton Park, supra*, 401 U.S. at 419, such affidavits are "merely 'post hoc' rationalizations" for administrative action, and cannot be given great weight.

21 The project requests were for three-year programs for PSWOP and a one-year program for IFI. The June 1, 1972, approval letter from HEW for PSWOP granted approval for one year and provided that requests for approval to continue for a second year were to be made on the basis of an evaluation of the first nine months of the program's activities. In addition, the HEW Handbook of Public Assistance Administration § 8240 provides for rescission of approval at any time during a project's life.

specific determinations on the basis of explicit, legislatively prescribed considerations, rather than reach an over-all "judgment". In saying this we are not insensitive to the impact these projects may have on the lives of thousands of people, many of whom are in "brutal need," *Goldberg* v. *Kelly*, 397 U.S. 254, 261 (1970). Yet the Secretary could properly take into account the growing antagonism to the welfare system and the possibility that, unless the public is satisfied that every reasonable effort is being made to induce employable recipients of assistance to work, pressure on governors and state legislators might cause the level at which needs are met to be reduced well below New York's 90%, with far greater ultimate hardship than these projects may entail.

Appellants claim that the Secretary exceeded his authority under 42 U.S.C. § 1315 in two respects. The first is that there was no basis on which the projects could be deemed "likely to assist in promoting the objectives" of the specified parts of the Social Security Act. Appellants argue that the objective of federal participation in the AFDC program, as stated in 42 U.S.C. § 601, is to assist the states "to furnish financial assistance and rehabilitation and other services" which will encourage "the care of dependent children in their own homes or in the homes of relatives"—not to force their parents or relatives, or themselves, to work.

This takes too narrow a view of Congress' purpose. To begin, Congress must have realized that extension of assistance to cases where parents, relatives or the child himself was capable of earning money would diminish the funds available for cases where they were not. While common sense would lead to that conclusion, one does not have to resort to that useful tool. As shown in *King* v. *Smith*, *supra*, 392 U.S. at 327-29, the committee reports

and floor debates incident to enactment of the AFDC program as part of the Social Security Act of 1935, 49 Stat. 620, are full of references to the concept that the ideal was a situation in which the family "breadwinner" would win the needed bread and that public assistance was a solution only for those children whose natural "breadwinner" was dead, incapacitated, or continually absent. Beyond that, 42 U.S.C. § 601 itself states as one of the purposes of the program "to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." Further, Congress has on a number of occasions indicated its view that such "capability" is enhanced by projects enabling the parents or relatives to work. The 1935 Act contained a section, 409, 42 U.S.C. § 609, for community work and training programs quite similar to those here at issue; while that section was repealed in 1968, it was replaced by the Work Incentive (WIN) Program, 42 U.S.C. §§ 630-43. The WIN program is a work-relief program virtually identical in scope and design to New York's PSWOP;[22] in fact, with respect to wage minimums PSWOP and especially IFI, which explicitly provides that participants shall receive the same fringe benefits as their coworkers, are more advantageous to the participant than WIN.[23] In the face of Congress' expression of its belief in

---

22 The May 31, 1972, approval letter for PSWOP, and also counsel for the state appellees at oral argument, indicated that the need for these new projects arose not from deficiencies in the scope or structure of WIN, but from the limited extent of its implementation in New York. Apparently the state preferred to have projects in which the initiative for implementation rested in its own hands.

23 Counsel for the plaintiffs urge that, in addition to possible wage differentials, participants in IFI and PSWOP will be disadvantaged relative to participants in WIN because "WIN guarantees the availability of a full range of services designed to insure . . . that the family will be aided in making the necessary adjustment . . ." While WIN reg-

the possible efficacy of this type of program, most recently reaffirmed in the 1971 amendments to the WIN program, 85 Stat. 803, appellants' arguments that the New York programs are contrary to the objectives of AFDC are clearly misdirected. Although the stereotype envisioned by Congress was doubtless the situation where the male member of the family wins the bread, the work relief concept is broad enough to cover cases where a female family member is capable of contributing to the family's support, provided that the children are properly cared for during her absence from the home. Indeed, the eligibility requirements of the WIN program do not distinguish between male and female relatives.

Next in breadth is appellants' contention that 42 U.S.C. § 1315 does not permit the Secretary to waive any requirement of § 602 which might result in the curtailment or denial of assistance.[24] Conceding that on its face 42 U.S.C. § 1315 permits waiver of the basic requirement that aid be furnished "to all eligible individuals" within the state, 42 U.S.C. § 602(a)(10), appellants rely on bits of legislative history which, in their view, demonstrate that the sole purpose of § 1315 was to permit experiments in administrative techniques free from the requirement of 42 U.S.C.

---

ulations, 45 CFR § 220.35(b)(2)(i) make a wide range of supportive services, listed in *id.* § 220.18 *et seq.*, available to AFDC recipients, the WIN program in no way guarantees their availability. Indeed, the HEW WIN Handbook § 80.6 (1972) states that the only service which must be provided before certification under 42 U.S.C. § 602(a)(19) is a medical examination, and that the only service which must be available before entering a work project is child care. Both these services appear to be elements of the New York projects in equal measure and with parallel provisions for insuring adequacy.

24 We refer here to the imposition of conditions for AFDC eligibility in addition to those included in the Act which may lead to suspension or termination based on refusal to participate. As indicated above, n.4, we do not envision any loss in the amount of assistance by participants.

§ 602(a)(1) for statewide uniformity. If that was the sole purpose, it would be hard to understand why the waiver authority was so extensive. In fact, the passages in the Committee reports on which appellants rely, S. Rep. No. 1589, 87th Cong., 2d Sess. 19-20, 1962 U.S. Code Cong. & Adm. News 1943, 1961-62 (1962); H.R. Rep. No. 1414, 87th Cong. 2d Sess. 24 (1962), do not carry the day for them; the Senate Report says that "[t]he public assistance titles of the Social Security Act contain a number of requirements on the States for approval of a State plan" which "often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients," and cites the statewide uniformity requirement only as "one example." We likewise find unpersuasive the arguments that the examples given in the Congressional hearings and in the HEW Handbook of Public Assistance Administration issued on its enactment concerned the development of new services and improving administration. This is rather a case, in Mr. Justice Frankfurter's phrase, "for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States,* 350 U.S. 366, 374 (1956). The limitation, and the only limitation imposed on the Secretary was that he must judge the project to be "likely to assist in promoting the objectives" of the designated parts of the Social Security Act. *California Welfare Rights Organization* v. *Richardson,* F. Supp. (N.D. Calif. 1972).

This bring us to the question whether the Secretary had a rational basis for determining that the programs were "likely to assist in promoting the objectives" of Part A of Subchapter IV. The Action Memorandum on PSWOP informed the Secretary that the New York Department of Social Services expected the following results:

A. Decreased costs of public assistance.
B. Increased self-support or self-care of recipients.
C. Increased initiative of recipients.
D. Increased self-respect of recipients.
E. Increased community participation.
F. Improved public attitude toward public welfare.

The Action Memorandum on IFI said:

> The State anticipates that "Incentives for Independence" will increase self-support or self-care of present recipients. The impact of the project on the behavior and attitudes of welfare recipients will be analyzed. The State also wishes to determine whether such a program is administratively feasible or efficient, and whether it modifies the attitude of the public toward welfare. The objectives of the project include:
>
> 1. Employment of able-bodied adults.
> 2. Development and use of employability skills in young adults.
> 3. Education and motivation of school-age children.

It is impossible to deny that attainment of these goals, or even of some of them, would meet the test of 42 U.S.C. § 1315. Appellants' criticisms, apart from those already rejected, are rather that the programs simply cannot in fact achieve the objectives or any of them. In its comprehensive letter submitted to the Department and transmitted to the Secretary along with the Action Memorandums, the Center on Social Welfare Policy and Law criticized the projects on numerous grounds, among others, alleged differentials between the payments to the partici-

pants and those to regular employees,[25] the coercive effects of the programs, lack of adequate standards with respect to child care, the absence of specificity concerning the types of jobs to which welfare recipients will be assigned and the standards that would justify refusal to participate, the unlikelihood that experience in the types of jobs indicated as likely candidates would qualify a welfare recipient for employment in the general economy, and the improbability that many such jobs will be available.[26] It also developed other possible and less harsh means for improving public attitude toward the welfare program, *e.g.*, by demonstrating how large a proportion of the recipients

---

25 In light of the terms of the program we do not understand how such differentials could occur except for the point that PSWOP participants will not share in "the extras or fringe benefits earned by regular employees." We are not told what such extras or fringe benefits would be in the case of public employees in so early a stage of employment. In any event we do not believe that the absence of such benefits violates congressional policy in the welfare area. 42 U.S.C. § 609(a)(1)(B), now repealed, required only that the rates of pay be "not less than the minimum rate (if any) provided by or under State law for the same type of work and not less than the rates prevailing for similar work in the community," the same phrase used in PSWOP and IFI. We have found no regulation reading the language of § 609(a)(1)(B) to include fringe benefits. The successor to § 609, the WIN program, 42 U.S.C. § 633(e)(4), is even less favorable to welfare recipients; it requires only that "[n]o wage rates provided under any agreement entered into under this subsection shall be lower than the applicable minimum wage for the particular work concerned." The Work Incentive Program Handbook, § 9360(2)-3 adds that if no minimum wage is applicable, "the wage must not be substantially less favorable than the wage normally paid for similar work in that labor market, but in no event, less than three-quarters of the Federal minimum wage." Again, nothing is said expressly pertaining to fringe benefits, and we have been cited to no practice for their inclusion. It must also be realized that participants in the programs here attacked receive substantial benefits in the way of free child care and assurance of immediate resumption of assistance not provided for the ordinary worker.

26 The State has indicated that it will require local departments of social services in PSWOP areas to develop a "sufficient number and variety" of projects to insure that all unemployed employable AFDC recipients receive jobs. See PSWOP Policy and Procedures, at 6.

were in fact unemployable and the absence of employment opportunities. As indicated, the State submitted two memoranda, which were also transmitted to the Secretary, one identifying the objections and the other endeavoring to answer them, an endeavor that was successful at least to a substantial degree.

We are satisfied that the materials before the Secretary sufficed for "a consideration of the relevant factors" by him and that there was no "clear error of judgment" on his part. *Overton Park, supra*, 401 U.S. at 416. While the Center's arguments were impressive, they were to some extent contradictory—that the programs would have a massive adverse effect on welfare recipients, and that there were so few employables and employment opportunities that the programs could not prove anything. Ascertainment by actual demonstration whether the latter claim is true would itself be a legitimate objective. Moreover, as previously indicated, we think the Secretary could properly give weight to the fact that the programs were of limited duration and would remain under the on-going supervision (with the power to terminate approval) of HEW. Experience will be the best test of the reality of appellants' fears, and a strong showing would be required to demonstrate that the Secretary could not properly subject them to it. In this respect, appellants ask us to administer a prophylaxis against possible adverse results from the Secretary's determination far beyond the limited review outlined in *Overton Park*. Whether we would have been convinced by the State's case if we had been in the Secretary's shoes is immaterial. "The court is not empowered to substitute its judgment for that of the agency." *Overton Park, supra*, 401 U.S. at 416.

Still another set of objections by the individual and welfare organization appellants is that the Secretary had

inadequate information concerning many details. However, the material furnished by the State in justifying the programs and applying for approval[27] adequately covered the policy, budgetary and logistical essentials, and the statute —speaking in terms of an otherwise unfettered "judgment" —does not require that, before the Secretary approves an experiment, every i must be dotted and every t crossed. A more important objection is that the material before the Secretary affirmatively showed the incapacity of state and local welfare and employment agencies to take on this added task. New York City eagerly joins in claiming it cannot do the job the State has assigned it. Appellants call attention to the phrasing of a letter from HEW's Assistant Administrator, Research and Administrations, to the Center saying only:

> We have no reason at this time to assume that New York will be unable to carry out the provisions of the demonstrations

and argue that this is a far cry from a finding that the ability exists. But this case does not involve "adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a), to which alone the requirement of findings, 5 U.S.C. § 557 (c), applies. Moreover, the same letter continues:

> A major purpose of the evaluation will be to assess the administrative feasibility of IFI and PSWOP.

---

27 In contrast to *Citizens to Preserve Overton Park, supra*, 401 U.S. at 412 n.28, we find no indication in the legislative history behind § 1315 that "the Secretary is not to limit his consideration to information supplied by state and local officials but is to go beyond this information and reach his own independent decision"—at least if this were read to require him to make a further field investigation rather than simply to consider the comments of objectors and the views of his own staff.

If, for example, the programs succeeded in some districts and failed in others, this might reveal whether a difference in the quality of administration was the reason and whether increased expenditure on or better organization of administration was essential. Only if the materials showed such administrative incapacity as to negate any appreciable possibility of success would the Secretary's approval be arbitrary and capricious. This was not the case. Rather, as indicated in our summary of HEW's review, *supra*, HEW, as conditions to implementing the programs pursuant to its November 1971, and June 1972 approvals, demanded assurances of the State's capacity to perform, with which it was presumably satisfied.[28]

Appellants' final statutory claim[29] is that the Secretary's action is ineffective because it did not expressly waive compliance with 42 U.S.C. § 602(a)(19), which requires every State plan to provide for the prompt referral[30] of certain

---

28 Plaintiffs argued also that a provision in HEW's Handbook of Public Assistance Administration directing that "[a]pplications [for § 1315 approval] will be appraised with respect to the clarity of the plan and the ability of the agency to provide for methods or organization, administration, and staffing which holds reasonable promise of carrying out the project effectively" imposes a stricter standard to which HEW must be held. See *Cappadora* v. *Celebrezze*, *supra*, 356 F.2d at 6. However, in view of our discussion of the permissible purposes of the projects, in particular the projects' usefulness in determining local administrative capabilities, defendants have not unreasonably deviated from their own rules.

29 In their complaint, plaintiffs also raised HEW's failure to waive the provisions of 42 U.S.C. § 602(a)(7) and (8) as to PSWOP. These sections would appear to require any AFDC program to disregard certain income received by recipients, and PSWOP contains no provision for such disregard. However, plaintiffs in their brief to this court specifically note that at the preliminary injunction stage they are raising only the failure to waive section 602(a)(19) and prefer to raise the other claims of inadequate waiver at the trial. But see footnote 4 *supra*.

30 42 U.S.C. § 602(a)(19) as in effect at the time of the Secretary's approval in June, 1972, required "referral" to the Secretary of Labor. The 1971 Amendments to the WIN program, 85 Stat. 802 (December 28,

welfare recipients to the Secretary of Labor for participation in the WIN program. It is not immediately apparent from the language of § 602(a)(19) whether this merely demands such a program, which the New York State AFDC plan has, or outlaws any other state work program, as held by a three-judge court in this circuit in a decision, *Dublino* v. *New York State Department of Social Service*, 348 F. Supp. 290 (W.D.N.Y. 1972), now on appeal to the Supreme Court, consideration of jurisdiction postponed to hearing on the merits, 41 U.S.L.W. 3391 (Jan. 16, 1973); see also *Jeffries* v. *Sugarman*, F. Supp. (S.D.N.Y. 1972), an appeal from which is now pending before this court; *Woolfolk* v. *Brown*, 325 F. Supp. 1162 (E.D. Va. 1971), aff'd 456 F.2d 652 (4 Cir. 1972). If the Supreme Court should reverse or seriously restrict the holding in *Dublino*, appellants' argument would be largely drained of force. However, it would be quite improper for us to endeavor to anticipate the Court's decision, and we think it undesirable to decide an issue now pending before that Court and this if decision can be avoided. We believe it can be.

The "stick" in the WIN program is the provision, 42 U.S.C. § 602(19)(F), whereby individual aid may be reduced (or, in one instance eliminated) whenever an individual has been found by the Secretary of Labor to have refused without good cause to participate in a project established under the program, or has "refused without good cause to accept employment in which he is able to engage which is offered through public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a

---

1971), effective July 1, 1972, directed that each AFDC shall register with the state WIN agency, which in turn shall "certify" eligible participants to the Secretary of Labor.

bona fide offer of employment." Although on their face the two latter provisions, the first of which would be here applicable, do not seem to be limited to employment procured through the WIN program, in which event waiver of 42 U.S.C. § 602(a)(19) clearly would not be required here, they appear to have been generally read as limited to persons participating in WIN programs, *see, e.g., Woolfolk* v. *Brown, supra,* 325 F. Supp. at 1169, and we shall assume, without deciding, that this is what they mean. However, there is force in the defendants' contention that the Secretary's waiver of the basic requirement for payment of assistance "to all eligible individuals", 42 U.S.C. § 602(a)(10), includes waiver of any further conditions to eligibility implicit in the program. It is clear, both from the entire context and from specific references in the materials before him, that the proponents and opponents of the projects and the Secretary were well aware that the PSWOP and IFI work programs differed in some respects from WIN; indeed their very purpose was to provide employment for AFDC recipients not participating in a WIN program. It would elevate form over substance to issue a temporary injunction against the operation of these projects until the Secretary went through the formality of adding 28 U.S.C. 602(a)(19) to the list of sections compliance with which was being waived.

VI. *The Constitutional Issues*

We deal first with appellants' claims that the different treatment of the 25% of the State welfare recipients in the areas chosen for inclusion in PSWOP and the 2.5% of such recipients chosen for inclusion in IFI from that accorded welfare recipients in the rest of the State violates the Equal Protection Clause of the Fourteenth Amendment.

Dandridge v. *Williams,* 397 U.S. 471, 484-86 (1970), decided that despite the fact that "the administration of

public welfare assistance . . . involves the most basic economic needs of impoverished human beings," claims of denial of equal protection in the allocation of welfare benefits did not invoke the "strict scrutiny" developed by the Court for equal protection claims where "fundamental rights" were at stake. The Court has since reaffirmed this in *Richardson* v. *Belcher*, 404 U.S. 78 (1971), and *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). As said in the latter case, 406 U.S. at 546-47:

> So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

If the standard of review is as limited as held in *Dandridge*, appellants' equal protection claim does not reach the level of substantiality. However, it has been recently suggested, see Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 17-24 (1972), that the Court is developing a standard more stringent than that limned in *Dandridge* but lower than "strict scrutiny"—whether as a replacement for the "two-tiered equal protection" which many have found unsatisfactory, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 177 (1972) (dissenting opinion of Mr. Justice Rehnquist), or as a narrowing of the gap between the tiers. Even if the standard here applicable is "that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber* v. *Aetna Casualty & Surety Co.*, *supra*, 406 U.S. at 172 (Mr. Justice Powell), or that "an appropriate governmental interest [is] suitably furthered

by the differential treatment," *Chicago Police Department* v. *Mosley*, 408 U.S. 92, 95 (1972) (Mr. Justice Marshall), the test was met here.

A purpose to determine whether and how improvements can be made in the welfare system is as "legitimate" or "appropriate" as anything can be. This purpose is "suitably furthered" by controlled experiment, a method long used in medical science which has its application in the social sciences as well. As Mr. Justice Brandeis said in his famous dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932), "To stay experimentation in things social and economic is a grave responsibility." Just as the Due Process clause should not have been read to condemn the experiment in the "laboratory" of "a single courageous State" involved in *New State*, the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis. The objections to allowing officials "to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected," eloquently voiced in Mr. Justice Jackson's concurring opinion in *Railway Express Agency* v. *New York*, 346 U.S. 106, 111 (1949), are inapposite to the selection, on a random but rational basis, of certain areas of the state to try out a program for the very purpose of determining whether it, or some variation of it, should be made applicable to all. The Equal Protection clause does not place a state in a vice where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action. Once it is determined that New York may justifiably conduct an experiment in certain areas, appellants' objections, going to details, *e.g.*, that there was no need for so large a sample as

PSWOP's 25%,[31] that the areas chosen were not shown to have any greater need than others, etc., does not require discussion. As said by Mr. Justice Holmes, dissenting in *Louisville Gas Co.* v. *Coleman*, 237 U.S. 32, 41 (1928), "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." See also *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Metropolis Theatre Co.* v. *Chicago*, 228 U.S. 61, 69-70 (1913).

Appellants' due process objections center about the procedures for determining whether welfare recipients are employable within the criteria of the two projects or, even if so, have "good cause" for declining a particular job opportunity.[32] While we do not consider appellants'

---

31 Appellants argue that if 2.5% sufficed for IFI, it should also have sufficed for PSWOP. But IFI is a relatively minor variation on PSWOP, and the State could rationally determine that a larger sample was needed to test the basic program than the embroidery upon it.

32 Appellants suggest that good cause would exist if the project did not meet the State's minimal requirements, such as:

1. Reasonable assurance that work will be performed in such a manner to insure that the work is useful;
2. Persons assigned to such projects will not be used to replace, to perform any work ordinarily and actually performed by regular employees of any department or other unit of government, or to replace or to perform any work which would ordinarily be performed by craft or trade in private employment. (In the event of an extreme emergency, such as a flood, fire, etc., such a restriction could be waived so long as the work to be performed was work normally undertaken by the sponsor of the project.);
3. Appropriate standards of health, safety and other conditions are established and maintained. Participants should be given adequate protection against hazards or activities which would adversely affect their health;
4. Sanitary facilities should be supplied or available, and a basic standard of cleanliness be maintained;

contention that the standards for determining eligibility and good cause are too vague for fair enforcement to be substantial, we are concerned with the adequacy of the opportunity for a hearing. Although the plans provide for a "fair hearing" under 18 N.Y.C.R.R. § 385 before assistance to an AFDC recipient can be suspended for unjustified failure to accept a job opportunity or to continue to work thereon, appellants argue that this right is unconstitutionally burdened by the provisions of 18 N.Y.C.R.R. § 385.7 that if the result of the hearing is adverse, the recipient shall "be disqualified for thirty days thereafter" and until such time as he is willing to comply. This seems to mean that even if the recipient accepts the determination of the hearing and is willing to take a referral immediately, he would nevertheless be deprived of assistance for thirty days.

The procedural aspect of this element of the case is somewhat puzzling. The thirty-day suspension provision of 18 N.Y.C.R.R. § 385.7 is one of general application, not part of the two projects here sought to be enjoined. Although 28 U.S.C. § 2281 applies to statewide regulations as well as to statutes, see *Oklahoma Gas Co.* v. *Russell*, 261 U.S. 290 (1923), neither the complaint nor the motion for interlocutory relief sought an injunction against the enforcement of the thirty-day suspension provision as such, and, despite a contrary intimation in the district court's opinion, plaintiffs not only did not ask for the convocation of a three-judge court but alleged that none of the claims in the complaint, save one as to the unconstitutionality of 42 U.S.C. § 1315, which was not being pressed on the motion for a temporary injunction, would require the con-

5. Participants shall be required to perform only those physical activities which are within their established physical capabilities;

6. Adequate first-aid supplies shall be available at the site of the project.

vening of such a court. Yet, if it is sought to enjoin 18 N.Y.C.R.R. § 385.7, a statewide regulation, on due process grounds, a three-judge court might well be required,[33] and arguably appellants cannot here press a point which they failed to pursue in the district court in the only effective manner.

The State's brief says that so long as the injunction issued by the district court in *Dublino, supra*, 348 F. Supp. 290, remains in effect "the thirty-day suspension of benefits mandated by 18 N.Y.C.R.R. § 385.7 will not be invoked against any recipient, including those affected by PSWOP and IFI." It suggests also that "[t]he validity of that statewide regulation should be determined in general, rather than relating to the demonstration projects alone." We take this to mean that New York would wish to be able to continue the demonstration projects even if the thirty-day suspension provision were held unconstitutional, whether through the issuance of an injunction by a three-judge court or, possibly, a declaratory judgment by a single judge, contrast *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-55 (1963), with *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943); see American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 322-23 (1969).

The question of the constitutionality of § 385.7 has its difficulties. Presumably the argument in favor of the thirty-day suspension is that it constitutes the only effective sanction against the assertion of claims for a hearing in every case, with a consequent breakdown of the entire work

---

33 We recognize the perennial question whether the attack would be on § 385.7 as such or only "as applied" in connection with PSWOP and WIN, in which event a three-judge court would not be needed since these projects are not statewide. *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Board of Regents* v. *New Left Education Project*, 404 U.S. 541 (1972). See D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1 (1964).

program, since otherwise an adverse determination would simply require the recipient to do what he should have done long before. Yet a somewhat similar argument concerning proliferation of hearings did not win favor in *Goldberg* v. *Kelly*, 397 U.S. 254, 265-66 (1970), on the issue there presented. Appellants argue that the necessitous circumstances of welfare recipients make the risk of a thirty-day suspension, even for the one family member concerned, totally unacceptable; as a practical matter, the suspension thus operates as a denial of a hearing before an unemployable recipient, or one with good cause for refusal, is forced to accept employment, with possibly drastic results for his children. Compare *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331 (1920).

We are reluctant to decide such a difficult question with the almost total absence of briefing the defendants have afforded. The State's entire discussion of the point takes less than a page; the only citations are *Goldberg*, which scarcely assists it, and a statement in *Dublino, supra*, 348 F. Supp. at 299, that "[t]he Commissioner's representations effectively nullify plaintiffs' argument on the absence of and need for a fair hearing upon a determination of employability and before termination . . . . " There is nothing to inform us whether argument in *Dublino* focused on the thirty-day suspension. The brief of the federal defendants is equally cursory on this point, with *Dublino* the only citation.[34]

---

34 We think it appropriate to note how little help we have received from the defendants' briefs—a circumstance not unusual in welfare cases. Three-quarters of the State's brief deals with questions of standing and jurisdiction; it contains no table of cases as required by F.R.A.P. 28(b). The largely conclusory brief of the federal defendants contains neither an index nor a table of cases, similarly required. Although the appeal was heard on an expedited basis, it had been pending in the district court for several months, and counsel must have anticipated that an appeal would be taken whatever the result below.

In light of the State's representation that the thirty-day suspension will not be enforced so long as the *Dublino* injunction remains in effect, the district judge could have thought there was no immediate need for granting temporary injunctive relief on that issue. We believe, however, the plaintiffs should have protection, if that injunction should be dissolved, pending judicial resolution of the validity of the thirty-day suspension clause. On this issue, although not on the rest of the case, we consider plaintiffs to have met the test of *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2 Cir. 1953), that if the balance of hardships tip decidedly in their favor, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and for more deliberate investigation." We therefore direct that the denial of the temporary injunction be modified so as to enjoin the State defendants from enforcing the thirty-day suspension until its validity with respect to PSWOP and IFI has been finally determined.

As so modified, the order denying the temporary injunction is affirmed. The stay heretofore entered is continued until ten days after the filing of this opinion and if, within that period, an application for a further stay is made to the Supreme Court pursuant to its Rules 50 and 51, until the decision thereof. No costs.

FILED
JUN 9 1973
MICHAEL RODAK, JR., CLERK

No. 72-1416

In the Supreme Court of the United States

OCTOBER TERM, 1972

LYDIA AGUAYO, ET AL., PETITIONERS

v.

ELLIOT L. RICHARDSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

HARLINGTON WOOD, JR.,
Assistant Attorney General,

KATHRYN H. BALDWIN,
ROBERT S. GREENSPAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1416

LYDIA AGUAYO, ET AL., PETITIONERS

v.

ELLIOT L. RICHARDSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a) is reported at 352 F. Supp. 462. The opinion of the court of appeals (Pet. App. 19a) is reported at 473 F. 2d 1090.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1973. The petition for a writ of certiorari was filed on April 18, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Health, Education, and Welfare properly construed Section 1115 of the Social

Security Act, which permits him to approve "any experimental, pilot, or demonstration project" which in his judgment "is likely to assist in promoting the objectives" of welfare programs, as authorizing experimental state programs under which welfare recipients are required to work in order to obtain benefits.

2. Whether a State denies welfare recipients equal protection by requiring only certain of them to participate in those programs.

STATUTE INVOLVED

Section 1115 of the Social Security Act, 42 U.S.C. 1315, provides:

> In the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of subchapter I, X, XIV, or XIX of this chapter, or part A of subchapter IV of this chapter, in a State or States—
>
> (a) the Secretary may waive compliance with any of the requirements of section 302, 602, 1202, 1352, 1382, or 1396a of this title, as the case may be, to the extent and for the period he finds necessary to enable such State or States to carry out such project, and
>
> (b) costs of such project which would not otherwise be included as expenditures under section 303, 603, 1203, 1353, 1383, or 1396b of this title, as the case may be, and which are not included as part of the costs of projects under section 1310 of this title, shall, to the extent and for the period prescribed by the Secretary, be regarded as expenditures under

> the State plan or plans approved under such subchapter, or for administration of such plan or plans, as may be appropriate.
>
> In addition, not to exceed $4,000,000 of the aggregate amount appropriated for payments to States under such subchapters for any fiscal year beginning after June 30, 1967, shall be available, under such terms and conditions as the Secretary may establish, for payments to States to cover so much of the cost of such projects as is not covered by payments under such subchapters and is not included as part of the cost of projects for purposes of section 1310 of this title.

STATEMENT

This is an action to enjoin the State of New York from conducting two experimental work projects for persons receiving welfare assistance under the Aid to Families with Dependent Children ("AFDC") program, and to set aside the approval of the projects by the Secretary of Health, Education and Welfare ("HEW"). The two projects involved—Public Service Work Opportunities Project ("PSWOP") and Incentives for Independence ("IFI")—are "demonstration" work projects which require AFDC recipients who are able to work to accept proferred job opportunities. Both programs are designed to decrease the costs of public assistance and to increase the initiative of welfare recipients by offering public service job opportunities to persons on welfare. Both projects require that participants accept a tendered job offer or sustain a loss or reduction of their benefits, unless the individual is not "employable" within the

project guidelines—*e.g.*, when adequate child care is unavailable.[1]

Since these projects had not previously been tested by the State in actual practice, they were adopted on an "experimental" basis and instituted only in certain areas. PSWOP districts—comprising 25 percent of the State's welfare recipients—are distributed among upstate urban areas, metropolitan localities, and rural counties. IFI, consisting of 2.5 percent of welfare recipients, are to be conducted in urban, suburban and rural areas (Pet. App. 23a, 25a). Both demonstration projects are of limited duration—PSWOP for three years, and IFI for one year (Pet. App. 40a, n. 21).

In September 1971, New York requested the Secretary of Health, Education, and Welfare to approve the projects pursuant to Section 1115 of the Social Security Act, 42 U.S.C. 1315. Under that statute, the Secretary may provide states with financial assistance in "the case of any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of" the AFDC program of the Social Security Act. After the State supplied additional data regarding the proposed administration of

---

[1] The major difference between the projects is that PSWOP participants do not work full-time, but may only be employed for a period sufficient to earn an amount equal to their welfare benefits. IFI participants, on the other hand, work full-time, and may receive wages in excess of their benefits. IFI also contains a separate component for work motivation for school youth. Under this program, the children of families receiving AFDC relief who are over fifteen years of age are required to participate in community work projects for six hours semi-monthly during the school year. The benefits of the family of a noncomplying child are not reduced if the parent has made efforts to obtain the child's cooperation (Pet. App. 24a-27a).

the projects, the Secretary approved them, but for only one year with renewals contingent upon satisfactory implementation of the program (Pet. App. 28a-30a, 40a, n. 1).

The district court denied a preliminary injunction, and the court of appeals affirmed, holding that the Secretary had a rational basis for determining that the programs were "likely to assist in promoting the objectives" by decreasing costs of public assistance and of increasing the self support, initiative and self respect of recipients (Pet. App. 44a-45a). Chief Judge Friendly went further to state that the mere ascertainment of whether appellants' claim—that there were so few employables and employment opportunities that the programs could not prove anything is true—would itself be a legitimate objective (Pet. App. 47a).

As to the claim that the different treatment of the 25% chosen for the two experimental projects violates the Equal Protection Clause of the Fourteenth Amendment, Judge Friendly said, "[t]he Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis" (Pet. App. 53a).

ARGUMENT

1. Petitioners contend that the Secretary has no authority under Section 1115 of the Social Security Act to approve experimental programs under which welfare beneficiaries are required to work in order to obtain benefits. The broad language of the Section, however, contains no such limitation. It authorizes him to approve "any experimental, pilot, or demonstration project which, in [his] judgment * * * is likely to assist in promoting

the objectives of" the AFDC program. The Secretary acted within his authority in concluding that an experimental program designed to evaluate the effect of requiring welfare recipients to work in order to obtain benefits would further that objective.

Approval of these experimental programs comports with the congressional concern that employable welfare recipients be encouraged to work. As the court of appeals stated (Pet. App. 42a), the legislative history of the AFDC program is "full of references to the concept that the ideal was a situation in which the family 'breadwinner' would win the needed bread and that public assistance was a solution" only when there was no breadwinner. See *King* v. *Smith,* 392 U.S. 309. Furthermore, one of the stated objectives of the AFDC program is to "help * * * parents or relatives to attain or retain capability for the maximum self-support" (42 U.S.C. 601). The demonstration projects here assist welfare recipients in attaining that objective.[2]

---

[2] Petitioners contend that the recent repeal by Congress of a work relief program (42 U.S.C. 609) evidences a congressional departure from its concern that employable welfare recipients be encouraged to work. As the court of appeals noted, however, the program Congress repealed was supplanted by the statutory work relief program WIN (Work Incentive Program, 42 U.S.C. 630-644), thus demonstrating that Congress maintains a continuing interest in requiring work by welfare recipients. There is also no foundation to petitioners' claim that Section 1115 does not permit demonstration programs which deprive welfare recipients of rights accorded under Section 402 of the Act (42 U.S.C. 602)—which includes a provision that aid be furnished to "all eligible individuals" in the state. Both courts correctly held that the exhaustive waiver provisions of Section 1115 permits the Secretary to waive all of the requirements of Section 402, and that the Secretary's approval of the projects in issue here constituted such a waiver.

2. Petitioners further argue that the Secretary's approval of the projects did not satisfy the standards for administrative action announced in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. As the court of appeals held, however, "the materials before the Secretary sufficed for 'a consideration of the relevant factors' by him and * * * there was no 'clear error of judgment' on his part. *Overton Park, supra,* 401 U.S. at 416" (Pet. App. 47a). The court of appeals, noting that Section 1115 does not prescribe specific factors to be considered in approving experimental or demonstration projects, properly held that the Secretary had exercised the informed judgment required by the statute in evaluating the extensive policy, budgetary and logistical material furnished by the State in connection with the proposed projects. The court also pointed out that the projects were of limited duration and would be under the continuous supervision of HEW, thus enabling the Secretary to terminate approval if the implementation of the projects was unsatisfactory. The court of appeals correctly concluded that the Secretary properly approved the projects (*ibid.*).

3. Petitioners also contend that the State, in providing that the demonstration projects are to cover only some of its welfare recipients, violated the Equal Protection Clause of the Constitution. That claim, however, is foreclosed by *Dandridge* v. *Williams,* 397 U.S. 471, and *Jefferson* v. *Hackney,* 406 U.S. 535. In those decisions, this Court held that an otherwise reasonable state classification in social welfare matters does not offend the Equal Protection Clause because it results in some inequality; it is valid if it has some "reasonable basis." *Dandridge* v. *Williams, supra,* at 485; *Jefferson* v. *Hackney, supra.* As the court of appeals explained (Pet. App. 53a), the disparity in treatment here is reasonable

> A purpose to determine whether and how improvements can be made in the welfare system is as "legitimate" or "appropriate" as anything can be. * * * the Equal Protection clause should not be held to prevent a state from conducting an experiment designed for the good of all, including the participants, on less than a statewide basis. * * * The Equal Protection clause does not place a state in a vise where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action.

Contrary to petitioners' contention, the state did not arbitrarily select the welfare districts in which to conduct the projects. Both courts found that the districts were chosen on a rational basis, in order to provide an adequate sampling of welfare recipients from urban, suburban, and rural areas.[3]

---

[3] Petitioners point out that another case involving compulsory work rules established by New York is now pending before this Court in *New York State Department of Social Services, et al.* v. *Dublino* (Nos. 72-792, 72-802). The question in *Dublino* is whether New York may validly impose employment rules in addition to those prescribed by the federal work relief program, WIN, 42 U.S.C. 630-644. However, the issues in this case in no way depend upon this Court's disposition of *Dublino*. As petitioners concede (Pet. 37), the Secretary is authorized under Section 1115 to waive compliance with the WIN program in the case of demonstration projects. While it is the Secretary's position that a waiver was unnecessary here, the court of appeals held that the Secretary had waived compliance with WIN by approving the demonstration projects in issue here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.,
Assistant Attorney General.
KATHRYN H. BALDWIN,
ROBERT S. GREENSPAN,
Attorneys.

JUNE 1973.

DOJ-1973-06

SUPREME COURT, U. S.
FILED
JAN 4 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1416

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACYNTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Petitioners,

—against—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their official capacity; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF INDIVIDUAL AND ORGANIZATIONAL PETITIONERS

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Petitioners

In the

Supreme Court of the United States

October Term, 1972

No. 72-1416

Lydia Aguayo, *et al.*,

—and—

City of New York, *et al.*,

—and—

Upstate Welfare Rights Organization, *et al.*,

Petitioners,

—v.—

Elliot L. Richardson, *et al.*,

—and—

Abe Lavine, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

The state respondents in their opposing brief:

1. Misstate the current status of this matter in the United States District Court for the Southern District of New York.

2. Misstate their present plans regarding implementation of the two projects which are at issue herein.

3. Misstate the applicability of this court's decision in *New York State Department of Social Services* v. *Dublino*, —— U.S. ——, 93 S. Ct. 2507 (1973), to the issues raised by the petition herein.

Current Status of the Projects and Lower Court Action

The state respondents have stated that "a second application for a preliminary injunction is *sub judica* (sic) in the District Court" (Brief in Opp., p. 5*).

This is untrue. This matter was disposed of by the District Court on August 29, 1973. In addition, such request for injunctive relief was addressed to matters separate and apart from the issues raised by the petition for certiorari, and could not have afforded petitioners the relief which they seek by their request to this Court.

As noted in our petition, p. 15, the decision of the Court of Appeals *modified* the decision of the district court denying injunctive relief and affirmed such decision as so modified. Neither the federal nor state respondents petitioned for review from that aspect of the court's decision. In brief, this modification required the state respondents to provide payment to recipients for all expenses which they are required to incur solely because of their compelled participation in the projects, and to rescind their previous instruction subjecting individuals to a 30 day suspension

* All references to the state respondents' brief in opposition are to such brief as submitted in typed form on or about December 19, 1973. Petitioners are aware that the court has requested submission of printed copies but we have not yet received the brief in printed form.

of aid as a penalty for an act of non-cooperation with project requirements. Subsequent to the decision of the Court of Appeals, petitioners sought an injunction from the District Court to restrain implementation of the projects until the project procedures had been revised to assure that the project operations would conform to the requirements therefor established by the Court of Appeals' modification.

The state respondents are now, and have been since February 20, 1973, free of any judicial restraint with regard to implementation of the projects. Petitioners first sought injunctive relief to enforce the decision of the Court of Appeals in March of 1973 but state respondents repeatedly sought extension of their time to respond on the grounds that they were then preparing revised procedures which would be submitted to the court as soon as they were completed and that they would voluntarily withhold implementation of the projects until such procedures had been so submitted and approved. When such procedures were not forthcoming by June 28, petitioners requested the court to proceed to disposition of the matter, and on or about July 19 the state respondents filed a memorandum in opposition. On August 29, the court, Cooper, J., held that the Court of Appeals decision was "self-executing" and that issuance of an injunction by it was not warranted since it had "no reason to doubt the good faith of the state to follow the mandate of the Circuit."

The state respondents are currently proceeding with plans for implementation of the Public Service Work Opportunities Project (PSWOP). It does appear, however, that they have abandoned their plans for implementation of the other controverted project, Incentives for Indepen-

dence (IFI), described at pp. 10-11 of our petition. Notwithstanding their continued reference to such project in their brief in opposition, they have advised the United States Department of Health, Education and Welfare by letter of November 5, 1973 that they were withdrawing such project. Of course, the delay of the state respondents in revising the project procedures for PSWOP and starting up such project makes it possible for this court, if it grants our petition for certiorari, to hear and determine the issues raised before the matter becomes moot by expiration of the project life. PSWOP has been approved for operation for a minimum of one year.

Relevance of This Court's Decision in New York State Department of Social Services* v. *Dublino

State respondents declare in their brief in opposition that the petitioners' "principal contentions" are that "all work programs must be governed by the WIN legislation" (Brief in Opp., p. 7), and that therefore, our principal contentions were disposed of unfavorably by this Court in *New York State Department of Social Services* v. *Dublino*. This declaration reveals a total lack of comprehension of the nature of the petitioners' claims, as well as a serious misunderstanding of the import of this court's decision in *Dublino*.

First, petitioners have never placed *principal* reliance on the conflicts between these projects and §402(a)(19) of the Act. As expressed in our petition, we have contended that the requirements imposed under the project are in violation of §402(a)(19) and that the evidence demonstrates that the Secretary of Health, Education and Welfare failed to consider whether and the extent to which such conflicts did exist, and further, failed to take the procedural action

necessary to specifically delineate the extent to which the state was authorized to depart from such requirements, and that these failures were part of the Secretary's overall failure to fully consider all relevant facts and otherwise comply with the requirements for decision-making under §1115 of the Act. We further contended in our petition that the Court of Appeals deliberately sought to free the Secretary from acting in accordance with law by accepting that the projects did pose conflicts with §402(a)(19) but nonetheless holding that it would "elevate form over substance" to require the Secretary to expressly waive §402(a)(19) as a precondition for authorizing state action inconsistent with such requirement. (See Petition for Certiorari, part 3(c), pp. 36-41.) However, this argument forms but one point in our argument as to the invalidity of the standard for administrative action established by the Court of Appeals in this case. Even if one were to assume that the force of this argument is weakened by this Court's decision in *Dublino,* therefore, this would affect no more than one part of one of the three substantial questions raised in the petition.

Secondly, as this Court specifically recognized in *Dublino,* the fact that a state is not completely barred from establishing its own work rules as a condition of eligibility for AFDC benefits does not mean that a state is free to do anything and everything in the name of a work program. Where a state proposes implementation of a state work rule in the basic statewide program, the Secretary of HEW is obligated to determine whether any specific aspect of such requirements conflicts with any provision of the Social Security Act including §402(a)(19) and in the event that he finds any such conflicts, the state would, of course, to

that extent be precluded from going forward with such requirements. (93 S. Ct., at 2517-2518.)

The Secretary is similarly obligated to determine the existence of such conflicts where a state proposes establishment of a work program as a §1115 project. Even assuming *arguendo* that he may allow the state in such a project to proceed with a provision which would otherwise be barred in the statewide program, he must nonetheless, under the terms of §1115, determine whether any such conflicts exist and must clearly and specifically exercise his waiver power under such section to establish the extent to which he has purported to free the state from the requirements of the Act. (See Petition, p. 38.) Absent such waiver, any individual affected by a project requirement which was in conflict with the Act should properly be able to refuse to comply since its implementation in the project would be no less illegal than if it were to be implemented in the statewide program. Accordingly, the Secretarial "approval" of these projects without a determination as to such conflicts is as invalid now as it was prior to this Court's decision in *Dublino*. However, if the erroneous holding of the Court of Appeals on this point is allowed to stand, it not only establishes an incorrect rule of law but it acts to bar petitioners from the relief to which they are legally entitled on this point.

Thus, the Court of Appeals has authorized implementation of the project requirements in toto (except as modified as discussed above) without any further consideration of, or need for, authorization for the resulting departures from the statutory requirements. Contrary to the suggestion of the state respondents that the district court could reopen the question of conflicts between the project and un-

waived requirements of Title IV (Brief in Opp., p. 10), the Court of Appeals has held that project requirements which violate §402(a)(19) may be imposed despite the absence of a waiver of all or any part of such provision. Moreover, the holding of that court in this regard would extend to violation of any other provision of the Act so long as the violating condition was fairly stated in the project application. This decision is no less than a blanket authorization for any and all violations of the Act notwithstanding the absence of any statement of secretarial recognition of and authorization for such violation in the manner and form prescribed by §1115.

Accordingly, although this court's decision in *Dublino* may have established that the extent of the conflict between the project and the Act is not as great as petitioners originally contended, the essential issue raised in question 3, paragraph (c), remains worthy of certiorari—can the Secretary validly exercise his authority under §1115 by approving a project in generalities without specifically dealing with the question of what waivers are required and proper under §1115(a).

Respectfully submitted,

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Petitioners